TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

No. 217.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

OTTO WYLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 9, 1891.

(14,728.)

LAW ASSOCIATION OF PHILADELPHIA

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1 UNITED STATES OF AMERICA, *sct:*

The President of the United States to the judges of the circuit court of the United States for the western division of the western district of Missouri, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Otto Wyler, plaintiff, and The Union Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Issued at office, in Kansas City, this 19th day of January, A. D. 1891.

{ Seal of the United States Circuit Court for the Western District of Missouri, Western Division. }

WARREN WATSON, *Clerk,*
By —— ——, *D. C.*

Allowed by—
HENRY C. CALDWELL,
Circuit Judge.

2 WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, } *sct:*

I do hereby return due and perfect obedience to the within writ and do herewith, under the seal of said circuit court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk and the seal of said court.

Issued at office, in Kansas City, this 31st day of March, A. D. 1891.

WARREN WATSON, *Clerk,*
By —— ——, *Deputy Clerk.*

3 UNITED STATES OF AMERICA, *sct:*

To Otto Wyler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein The Union Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Caldwell, judge of the circuit court of the United States for the western division of the western district of Missouri, this 22d day of January, in the year of our Lord one thousand eight hundred and ninety-one.

HENRY C. CALDWELL,
Circuit Judge.

4 [Endorsed:] United States circuit court, western district of Missouri, western division. Otto Wyler *vs.* Union Pacific R'y Co. Citation. Filed —— —, 188–. ——— ——, clerk.

UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

I hereby acknowledge due service of the within citation this 10th day of February, A. D. 1891.

THOS. P. FENLON,
Attorney for Defendant in Error.

5 In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri, September Term, 1890.

OTTO WYLER, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY CO., Defendant.

Assignment of Errors.

Now comes The Union Pacific Railway Company and files this its assignment of errors in the above-entitled cause and avers that in the records and proceedings in the above-entitled cause there is manifest error in this, to wit, that the court erred in permitting plaintiff to amend his petition by changing the cause of action therein stated and introducing a new and entirely different cause of action.

(2.) The court erred in sustaining plaintiff's demurrer to the third paragraph of defendant's amended answer; which answer was filed March 5th, 1889.

(3.) The court erred in making the following improper remarks in the presence of the jury in the course of the following testimony (testimony of plaintiff):

Q. Did you write out in German the contents of that paper, and did Mr. Muelchester translate it for you?

A. No, sir; I did not.

Q. Did you not testify that you did write it out yourself, and that Mr. Muelchester translated it?

6 A. No; I never said that.

Q. Was not this question put to you, and did you not answer as follows: Q. How did it happen to be made out in this way—that is, this paper? A. I had written that up at home in German and had my wife call at Muelchester's office to have it written out and interpreted.

(No answer.)

Q. That you had already written up the statement in German for Muelchester to translate for you to sign?

A. Yes, sir—no.

Mr. FENLON: Does he understand that he was asked the question *is* if he didn't so testify before?

INTERPRETER: Yes, sir; he says he made that statement.

The COURT: What statement?

INTERPRETER: The statement about that letter.

The COURT: That is too indefinite. Let me have that statement. The witness testifies under many disadvantages. Ask him if he wrote out that statement in German.

Q. Who did write out that statement in German?

A. His wife, with the assistance of this man Klein.

Q. By whose direction was it written—who ordered it?

A. Nobody. I was very deathly sick at that time, and my wife wanted to have some paper to show how I got injured. That is the way that came up.

Q. Did you tell her what to write?

A. No; I hadn't my senses at that time.

Q. Who did dictate it?

A. My wife did the writing.

Mr. BEEBE: I think my question has not been asked or answered yet.

7 The COURT: I know it has not. I do not attach much importance to the point you are trying to make; it is perfectly obvious that the witness never did say this. I will leave it to the jury, however.

Mr. BEEBE: We except to the remarks of the court.

The COURT: He is a German and it comes through an interpreter. You ask him if he testified to that before.

Mr. BEEBE: I shall be obliged specially at this time to except to the remarks of your honor upon the interpretation to be given in regard to what the witness meant.

The COURT: I leave it to the jury, but I have a perfect right to

tell them what my views are if I have occasion to say so. Ask him if he ever stated that.

(4.) The court erred during the trial in excluding the following testimony (testimony of pl'ff on cross-ex.):

Q. Were you ever in any large factories or iron works where they have a pit under their heavy machinery for the purpose of cleaning them?

A. Yes, sir.

Q. What are pits under heavy machinery for—what is the purpose of having pits under heavy machinery in factories and other works not connected with railroads?

Counsel for plaintiff here objected to the question as not legitimate cross-examination.

The COURT: What is your object, Mr. Beebe?

Mr. BEEBE: Our object is to show that pits are used in factories and other places for the purpose of cleaning machinery and replacing iron, &c..

8 The COURT: You can show that when you come to your part of the case.

Mr. BEEBE: I am asking him now what the purpose is.

Mr. FENLON: It isn't any scientific question that has been raised in this case.

The COURT: It isn't scientific, but if you insist upon the mere technical objection that it is not cross-examination the objection is good.

Counsel for defendant then and there excepted to the ruling of the court.

(5.) There is further manifest error in this, that the court erred in refusing to charge the jury at the close of plaintiff's case that under the pleadings and the evidence the verdict should — for defendant.

(6.) There was further manifest error in this, that the court, after all the evidence was closed, refused to charge the jury, though requested so to do by counsel for defendant, as follows:

First. That under the pleadings and the evidence the verdict should be for the defendant.

Second. That under the evidence the present case does not fall within the act of Kansas pleaded and the verdict should be for the defendant.

(7). There was also manifest error in this, that the court, over the objection and exception of defendant at the time, charged the jury as follows:

"If you find from the evidence that the plaintiff and his coemployé, while working for the defendant company, were lifting a heavy grate in the discharge of their duty as the employés

9 of the defendant company, and that the plaintiff's helper or coemployé negligently and improperly and without any sufficient ground or excuse for so doing suddenly let go his hold on such

grate without any warning to plaintiff, by reason of which the plaintiff was thrown down and injured by the weight of the iron, then that employé was guilty of negligence, and his negligence is the negligence of the defendant company in this case by the law of Kansas, and that entitles plaintiff to recover in this case.

"To which paragraph No. 3 defendant duly at the time exepted."

(8.) There was also manifest error in this, that, over the objection and exception of counsel at the time, the court charged the jury as follows:

"If the plaintiff's coemployé was not guilty of any negligence or if there was sufficient reason or justification for his act in letting go the grate at the time and under the circumstances he did, then the defendant company is not liable. It is a question of fact for you to determine, gentlemen, keeping in mind the definition of negligence which I have given to you, whether the conduct of the defendant's employé at the time the plaintiff received the injury complained of was a negligent, careless, or reckless act, or, in a word, whether it was a negligent act, one that a reasonably prudent man, standing in his shoes, would not under like circumstances have done. If a reasonably prudent man, standing in the shoes of Mr. Klein, would not have done the act that he did and which is claimed resulted in the injury to this plaintiff, then he is guilty of negligence and the company is liable.

"To which paragraph No. 4 the defendant then and there excepted."

(9.) There is also manifest error in this, that the court, over the objection and exception of defendant at the time, charged the jury as follows:

"If a reasonably prudent man, under the conditions surrounding him at the time he let go of that grate, would have done what he did, then he is not guilty of negligence and the defendant is not liable."

To which paragraph No. 5 the defendant then and there duly excepted.

(10.) There is also manifest error in this, that the court, over the objection and exception of the defendant at the time, charged the jury as follows:

"One word more. It has been stated by counsel that there have been two previous trials of this case, in which the jury disagreed. Gentlemen, I want to say to you that you are not expected to follow their example. This court does not have mistrials. You need not expect to get off, while I stay in this court, by leaving the case where the other juries have left it."

To which paragraph No. 9 the def't then and there duly excepted.

(11.) There is also further manifest error in this, that the court overruled defendant's motion for a new trial and motion in arrest of judgment.

(12.) And there is manifest error in this, that by the record aforesaid it appears that the judgment aforesaid was given for the said plaintiff against the said defendant, whereas by the law of the

land the said judgment ought to have been given for the said defendant against the said plaintiff, and the said defendant
11 prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that said Union Pacific Railway Company may be restored to all things which it hath lost by occasion of said judgment.

THE UNION PACIFIC RAILWAY CO.,
By its att'y, JOHN N. BEEBE.

12 UNITED STATES OF AMERICA, *sct:*

Be it remembered that heretofore, to wit, on Monday, October 11th, A. D. 1886, an entry was made upon the record of the circuit court of the United States for the western division of the western district of Missouri in words and figures as follows, to wit:

OTTO WYLER
against
UNION PACIFIC RAILWAY CO. } 1212.

There is this day received and filed a transcript of record in the above-entitled case, it having been removed by defendant by change of venue from the circuit court of Jackson county.

Said transcript is in words and figures as follows:

STATE OF MISSOURI, }
County of Jackson, } *ss:*

Be it remembered that on the 25th day of September, A. D. 1886, there was filed in the office of the clerk of the circuit court of Jackson county, Missouri, at Kansas City, a petition wherein Otto Wyler is plaintiff and The Union Pacific Railway Company is defendant; which said petition is in words and figures as follows, to wit:

In the Circuit — of Jackson County, at Kansas City, Mo., October Term, 1885.

OTTO WYLER
vs.
THE UNION PACIFIC RAILWAY COMPANY.

Plaintiff, for his cause of action, states that the defendant, The Union Pacific Railway Company, is a corporation duly incorporated under and by virtue of the laws of the United States, having an office or place of business in the city of Kansas, Jackson
13 county, Mo.; that said defendant corporation, further, is the owner of and did on the — day of April, 1883, and now operates a railroad, cars, locomotives, and engines over its road, which further runs and at that time ran through the county of Wyandotte, State of Kansas; that on the — day of April, 1883, and for a long time prior thereto plaintiff was and had been in the employ of the defendant and about its business at or near the city of

Wyandotte, in the county of Wyandotte, State of Kansas, in repairing the locomotives and engines owned and used by defendant on its said railroad; that on or about the — day of April, 1883, defendant had in its employ in and about said business at said place several other men besides plaintiff engaged in fixing and repairing the said locomotives and engines of defendant; that at said time defendant had in its employ, together with others, at said place and in said business one Charles B. Kline; that at said time Kline was wholly incompetent and unfit for the position which he occupied and the work he performed; that said incompetency was wholly unknown to plaintiff at said time, though well known to defendant, and defendant negligently and wrongfully kept and retained said Kline in its employ with full knowledge of his incompetency; that at said time and place plaintiff, at the request of defendant and in the ordinary course of his employment, was engaged in repairing a fire-box in one of defendant's locomotives; that on this particular occasion plaintiff was, at the request of defendant, assisted in said work by said Kline: that plaintiff and said Kline while so engaged in repairing said fire-box of said locomotive were in the act of lifting and placing in position the fire-dump belonging thereto (which was a part of their said business and employment), said dump being made of iron and of great weight; that while engaged in such business and without fault on the part of the plaintiff and through the negligence and mis-
14 management of defendant in retaining and employing the said Kline after knowing his incompetency the said heavy iron dump was carelessly and negligently thrown down and let fall upon and against the plaintiff, by reason whereof he, the said plaintiff, was jerked down and twisted and greatly hurt and injured, causing and producing a rupture and *and* aneurism of the descending aorta of the plaintiff so that he was unable to work, by reason whereof he has become permanently injured and disabled for life; that he was thrown out of employment and is still unable to work; that he has suffered great pain of body and mind and has been put to great expense in trying to be healed and cured of said injuries; that by reason of said injury so received he has been and is damaged in the sum of twenty-five thousand dollars, for which sum plaintiff asks judgment and for costs.

JENKINS, CLARKE & THOMAS,
Plaintiff's Att'ys.

Thereupon the following writ was issued, to wit:

Circuit Court Summons.

The State of Missouri to the sheriff of Jackson county, Greeting:

You are hereby commanded to summon The Union Pacific Railway Company, if it be found in your county, that it be and appear before the honorable judge of our circuit court of Jackson county at the court-house, in the city of Kansas, on the second Monday in October next, it being the 12th day of said month, then and there

to answer unto the complaint of Otto Wyler, as set forth in the foregoing petition, and that you then and there have this writ and that you certify how you execute the same.

Witness L. F. McCoy, clerk of the said circuit court, with the seal thereof, hereunto affixed at office, in Kansas City this 25th day of September, A. D. 1885.

[SEAL.]

L. F. McCOY, *Clerk*,
By J. S. CHASE, *D. C.*

15 The following return of sheriff is endorsed on the back thereof, to wit:

Executed this writ in Jackson county, Missouri, this 26th day of September, 1885, by delivering a copy of this writ, together with a copy of the petition hereunto attached, at a business office of the within-named defendant corporation, The Union Pacific Railway Company, with R. W. Griffith, chief clerk and person in charge of said business office in the absence of the president or the chief officer from Jackson Co., Mo.

WM. T. HICKMAN, *Sheriff*,
By D. F. GREENWOOD, *Deputy*.

Fee, $1.00; 1, def't.

Be it remembered that on the 1st day of the regular October term, A. D. 1885, of said court the following proceedings were had and made of record in this cause, to wit:

OTTO WYLER
vs.
UNION PACIFIC RAILWAY CO. } 6459.

This day defendant, by attorney, files herein its answer. Which said answer is as follows, to wit:

Circuit Court of Jackson Co., Oct. Term, 1885.

OTTO WYLER, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY CO.

Now comes defendant, and for answer to the plaintiff's petition denies each and every allegation therein contained and prays for judgment.

JOHN W. BEEBE,
Def't's Att'y.

16 And afterwards, on the 30th day of said term, the same being the 16th day of November, 1885, the following further proceedings were had and made of record in this cause, to wit:

OTTO WYLER
vs.
UNION PACIFIC RAILWAY COMPANY. } 6459.

Now, at this day, come parties, by attorney, and said defendant files petition and bond for the removal of this cause into the circuit court of the United States — and for the western division of the western district of Missouri, and upon consideration thereof the court grants the prayer of said petition, approves said bond and accepts the surety thereof, and orders that this cause be removed into the circuit court of the United States in and for the western division of the western district of Missouri.

Said petition for removal is as follows, to wit:

In the Circuit Court of Jackson County, State of Missouri.

OTTO WYLER, Plaintiff,
vs.
UNION PACIFIC RAILWAY CO., Defendant.

Petition for removal *of* the circuit court of the United States for the western division of the western district of Missouri.

To said circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That your petitioner was at the time of the commencement of this suit and still is a corporation created by the consolidation of the Union Pacific Railway Company, created and existing under
17 the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean and to secure to the Government the use of the same for the postal, military, and other purposes," approved July 1, 1862, the Kansas Pacific Railway Company, mentioned in said act of Congress as the Leavenworth, Pawnee and Western Railroad Company, a corporation created under the laws of Kansas, organized and operating its railroad in said State and a citizen thereof, and the Denver Pacific Railway and Telegraph Company, a corporation created by virtue of the laws of Colorado, operating a railroad in that State and a citizen thereof, such consolidation having been made by virtue of the authority contained in said act of Congress *contained*, the amendments thereto, and other acts of Congress authorizing the same, and that it is a corporation, not banking, organized under the laws of the United States; that it has a defense in this action arising under and by virtue of the laws of the United States, and your petitioner offers herewith a bond, with good and sufficient surety, for the entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this

suit was wrongfully or improperly removed thereto; and your petitioner prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States for the western division of the western district of Mo.; and it will ever pray.

JOHN W. BEEBE,
Attorney for Petitioner.

18 STATE OF MISSOURI, } ss:
Jackson County, }

I, John W. Beebe, being duly sworn, do say that I am one of the attorneys for the petitioner in the above-entitled cause, and that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

JOHN W. BEEBE.

Subscribed in my presence and sworn to before me this 16th day of November, A. D. 1885.

L. F. McCOY, *Clerk,*
By J. S. CHASE, *D. C.*

Which said bond for removal is as follows, to wit:

Know all men by these presents that we, the Union Pacific Railway Company, as principal, and John S. Usher, of Lawrence, Kansas, and Kansas City, Mo., respectively, are held and firmly bound unto Otto Wyler in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made unto the said Otto Wyler, his heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, yet upon these conditions The Union Pacific Railway Company, def't, having petitioned the circuit court of Jackson county, State of Missouri, for the removal of a certain cause therein pending, wherein Otto Wyler — plaintiff and Union Pacific Railway Company is defendant, to the circuit court of the United States in and for the western division of the western district of Missouri:

Now, if the Union Pacific Railway Co., your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court
19 of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this — day ——, A. D. 18—.

THE UNION PACIFIC RAILWAY CO., [SEAL.]
By J. W. BEEBE, *Its Att'y.*
J. P. USHER. [SEAL.]
JOHN W. BEEBE. [SEAL.]

STATE OF KANSAS, } ss:
County of Douglas, }

I, J. P. Usher, of said county, one of the sureties named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Kansas and a property-holder therein; that I am worth the sum of more than ten thousand (10,000) dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Kansas liable to execution of the value of more than ten thousand (10,000) dollars.

J. P. USHER.

Subscribed in my presence and sworn to before me this 11th day of November, 1885.

A. HADLEY,
Notary Public.

[SEAL.]

Term expires Dec. 8, '86.

STATE OF MISSOURI, } ss:
County of Jackson, }

I, L. F. McCoy, clerk of the circuit court of Jackson county, Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the proceedings and papers filed in the cause wherein Otto Wyler is plaintiff and The Union Pacific Railway Company is defendant, as the same remains of record and on file in my office.

In testimony whereof I have hereto set my hand and affixed the seal of said court. Done at office, in Kansas City, Mo., this — day of August, A. D. 1886.

[SEAL.]

L. F. McCOY.

And afterwards, to wit, on Saturday, November 13th, 1886, the following entry was made of record:

OTTO WYLER
against } 1212.
UNION PACIFIC R'Y CO.

Ordered that this case be continued.

And on Thursday, November 18th, 1886, the following entry was made of record:

OTTO WYLER
against } 1212.
UNION PACIFIC R'Y CO.

This day comes defendant, by its attorneys, and files amended answer herein.

Said amended answer is in words and figures as follows:

Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

OTTO WYLER, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Amended Answer.

I.

Defendant for this its amended answer denies each and every allegation in the petition of plaintiff and prays judgment.

21 II.

And for a second ground of defense defendant alleges that the plaintiff received the injury complained of by reason of his own negligence in the premises directly contributing thereto.

III.

And for a third ground of defense defendant alleges that at the time of the alleged injury and alleged cause of action described and set forth in said petition there has existed and ever since has existed a public statute of the State of Kansas, then and now in force, in words and figures as follows, to wit:

SECTION 18. Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have *occurred* and not afterwards.

Third. Within two years. An action for trespass upon real property an action for taking, detaining or injuring personal property an action for injury to the rights of others not founded on contract, and not hereinafter enumerated, an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Effect of bar.—Section 25th. When a right of action is barred by the provisions of any statute it shall be unavailable either as a cause of action or ground of defens*d*.

Plaintiff further states that the cause of action in said petition contained did not accrue within two years next before the commencement of this suit, and by force of the above statute h-rein pleaded the said action is forever barred and the alleged cause of action extinguished. Wherefore defendant prays judgment.

JOHN W. BEEBE,
Defendant's Att'y.

22 And afterwards, to wit, on the 20th day of May, 1887, the following entry was made of record:

OTTO WYLER
against
UNION PACIFIC R'Y CO. } 1212.

Ordered that the above cause be continued.

And afterwards, to wit, at the regular October term and on Thursday, November 3rd, 1887, the following entry was made of record in said cause:

OTTO WYLER
against
UNION PACIFIC RAILWAY CO. } 1212.

This day comes plaintiff and files reply to parts of answer and demurrer to parts of answer.

Said reply is in words and figures as follows:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

OTTO WYLER, Plaintiff,
v.
THE UNION PACIFIC RAILWAY COMPANY.

The plaintiff, for reply to the second ground of defense in the amended answer of the defendant, denies each and every statement, allegation, and averment therein contained and prays judgment.

JENKINS & WELLS,
Att'ys for Plaintiff.

23 Said demurrer is in words and figures as follows:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

OTTO WYLER, Plaintiff,
v.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff demurs to the third ground of defense contained in the amended answer of the defendant for the following ground, to wit:

Because said third ground of defense does not state facts sufficient to constitute a ground of defense to the suit of plaintiff.

Wherefore plaintiff prays judgment.

JENKINS & WELLS,
Att'ys for Pl'ff.

And afterwards, to wit, on Thursday, January 5th, 1888, the following entry was made of record, to wit:

OTTO WYLER
against
UNION PACIFIC R'Y CO. } 1212.

This day come the parties, by their attorneys, and thereupon it is ordered that this cause be continued, and that a submission of the demurrer herein be entered with leave to file briefs by April 1st ensuing, it being the understanding of the court and the parties hereto that said submission is to his honor Judge Brewer.

And afterwards, to wit, on the 23rd day of January, 1888, an amended answer was filed in words and figures as follows:

Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

OTTO WYLER, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Amended Answer.

Defendant, for this its amended answer, denies each and every allegation in the petition of plaintiff contained and prays judgment.

(II.)

And for a second ground of defense defendant alleges that the plaintiff received the injury complained of by reason of his own negligence in the premises directly contributing thereto.

(III.)

And for a third ground of defense defendant alleges that at the time of the alleged injury and alleged cause of action described and set forth in said petition there existed and has ever since existed a public statute of the State of Kansas then and now in force in words and figures as follows, to wit:

SECTION 18. Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have *occurred* and not afterwards.

Third. Within two years. An action for trespass upon real property, an action for taking, detaining or injuring personal property, an action for injury to the rights of others not founded on contract and not hereinafter enumerated, an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Effect of the bar.—Section 25th. When a right of action is barred by the provisions of any statute, it shall be unavailable
25 either as a cause of action or ground of defense.

Defendant further states that the cause of action in said petition contained did not accrue within two years next before the commencement of this suit, and that plaintiff and defendants were both residents of the State of Kansas at the time of said alleged injury to plaintiff, and have been a*b*d still are residents of said State of Kansas, and by force of the above statute herein pleaded the said cause of action is forever barred and the alleged cause of action extinguished. Wherefore defendant prays judgment.

JOHN W. BEEBE,
Att'y for Def't.

And on the 19th day of April, 1888, a stipulation was filed in words and figures as follows:

In the Circuit C't of the United States for the Western Division of the Western District of Missouri.

OTTO WYLER
vs.
THE UNION PACIFIC R'Y CO.

Plaintiffs and defendants, by their solicitors, in this cause hereby agree as follows: Plaintiff agrees to waive notice of the filing of the second amended answer heretofore filed by the defendant, and defendant agreed that the demurrer filed by the plaintiff to the amended answer herein shall be taken, considered, and acted on by the court as a demurrer to the said second amended answer.

JENKINS & WELLS,
Att'ys for Plaintiff.

And afterwards, to wit, on the 3rd day of July, 1888, the following entry was made of record:

26 OTTO WYLER *against* UNION PAC. R'Y CO. } 1212.

It is ordered that the demurrer of the plaintiff to part of defendant's answer herein be, and the same is, sustained.

And afterwards, to wit, on Thursday, October 25th, 1888, the following entry was made of record:

OTTO WYLER *against* U. P. RAILWAY CO. } 1212.

This day comes defendant and by consent and leave withdraws answer and files demurrer and also stipulation as to hearing.

Said demurrer is in words and figures as follows:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

OTTO WYLER
vs.
THE UNION PACIFIC RAILWAY CO.

Now comes the defendant and demurs to the petition herein for that said petition does not state facts sufficient to constitute a cause of action against def't.

Wherefore def't prays judgment.

JOHN W. BEEBE,
Att'ys for Def't.

Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Mo.

OTTO WYLER, Pl'ff,
vs.
THE UNION PACIFIC RAILWAY CO., Def't.

27 *Stipulation.*

It is agreed that leave may be granted to defendant to withdraw answer and file demurrer to plaintiff's petition. If pleadings are not complete and issue joined on or before Saturday, Oct. 27th, 1888, the cause to be passed subject to call by either party upon reasonable notice being given to counsel.

JENKINS & WELLS,
Att'ys for Pl'ff.
JOHN W. BEEBE,
Att'y for Def't.

And on Monday, October 29th, 1888, the following entry was made of record:

OTTO WYLER
against
U. P. R'Y CO. } 1212.

This day come defendants and plaintiff, by their attorneys, and argue and submit the demurrer to the petition; whereupon the same is sustained by the court and plaintiff takes leave to amend petition instanter.

And on Tuesday, October 30, 1888, the following entry was made of record:

OTTO WYLER
against
UNION PACIFIC R'Y CO. } 1212.

This day comes plaintiff, by attorney, and files amended petition herein.

Said amended petition is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

OTTO WYLER, Pl'ff,
ag'st
THE UNION PACIFIC RAILWAY COMPANY, Def't. } 1212.

28 Plaintiff, by way of amended petition, for his cause of action states that the defendant, The Union Pacific Railway Company, is a corporation duly incorporated under and by virtue of the laws of the United States, having an office or place of business in the city of Kansas, Jackson county, Missouri; that said de-

fendant corporation, further, is the owner of and did on the — day of April, A. D. 1883, and now operates a railroad, cars, locomotives, and engines over its road, which, further, runs and at that time ran through the county of Wyandotte, State of Kansas; that on the — day of April, A. D. 1883, and for a long time prior thereto plaintiff was and had been in the employ of the defendant and about its business at or near the city of Wyandotte, in the county of Wyandotte, State of Kansas, in repairing the locomotives and engines owned and used by the defendant on its said road; that on or about the — day of April, A. D. 1883, defendant had in its employ in and about said business at said place several other men besides plaintiff engaged in fixing and repairing the said locomotives and engines of defendant; that at said time defendant had in its employ, together with others, at said place and in said business one Charles B. Kline; that at said time said Kline was wholly incompetent and unfit for the position which he occupied and the work he performed; that said incompetency was wholly unknown to plaintiff at said time, though well known to defendant, and defendant negligently and wrongfully kept and retained said Kline in its employ with full knowledge of his incompetency; that at said time and place plaintiff, at the request of defendant and in the ordinary course of his employment, was engaged in repairing a fire-box in one of defendant's locomotives; that on this particular occasion plaintiff was, at the request of the defendant, assisted in said work by said Kline; that plaintiff and said Kline while so engaged in repairing said fire-box of said locomotive were in the act
29 of lifting and placing into position the fire-dump belonging thereto (which was a part of their said business and employment), said dump being made of iron and of great weight; that while engaged in said business and without fault on the part of plaintiff and through the negligence and mismanagement of the defendant, its agents and employés, and in consequence of the negligence and mismanagement of the said Kline, the said heavy iron dump was carelessly and negligently thrown down and let fall by said Kline upon and against the plaintiff, by reason whereof he, the said plaintiff, was jerked down and twisted and greatly hurt and injured, causing and producing a rupture and aneurism of the descending aorta of the plaintiff, so that he was unable to work, by reason whereof he has become permanently injured and disabled for life; that on account of said injuries he was thrown out of employment and is still unable to work; that he has suffered great pain of body and mind and has been put to great expense in trying to be healed and cured of said injuries; that by reason of said injury so received he has been and is damaged in the sum of twenty-five thousand dollars, for which sum plaintiff asks judgment and for costs.

T. P. FENLON,
JENKINS & WELLS,
Att'ys for Pl'ff.

And afterwards, to wit, on the 2nd day of November, 1888, the following entry was made of record:

3—217

OTTO WYLER
against
UNION PACIFIC RAILWAY CO. } 1212.

This day come the parties, by their attorneys, and, by consent, plaintiff files second amended petition.

30 Said amended petition is in words and figures as follows:

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri, October Special Term, 1888.

OTTO WYLER, Plaintiff,
vs.
UNION PACIFIC RAILWAY COMPANY, Defendant. } (Case No. 1212.)

Amended Petition.

Plaintiff, for amended petition, for his cause of action states that the defendant, The Union Pacific Railway Company, is a corporation duly incorporated under and by virtue of the laws of the United States, having an office and place of business in the city of Kansas, Jackson county, Mo.; that said def't corporation, further, is the owner of and did on the — day of April, 1883, and at the time of the filing of the original petition herein and now operates a railroad, cars, locomotives, and engines over its road, which, further, runs and at that time ran through the county of Wyandotte and State of Kansas; that on the — day of April, 1883, and for a long time prior thereto plaintiffs was and had been in the employ of the defendant about its business at or near the city of Wyandotte, in the county of Wyandotte and State of Kansas, in repairing the locomotives and engines owned and used by def't on its said road; that on or about the — day of April, 1883, def't had in its employ in and about said business at said place several other men besides plaintiff engaged in fixing and repairing the said locomotive and engines of def't; that at said time def't had in its employ, together with others, at said place and in said business one Charles P. Kline; that at said time and place plaintiff, at the request of def't and in the ordinary course of his employment, was engaged in repairing a fire-box in one of def't's locomotives; that on this particular occasion plaintiff was, at the request

31 of def't, assisted in said work by said Klein; that plaintiff and said Klein, while so engaged in repairing said fire-box of said locomotive, were in the act of lifting and placing into position the fire-dump belonging thereto, which was a part of their said business and employment, said dump being made of iron and of great weight; that while engaged in said business and without fault on the part of plaintiff and through the negligence and mismanagement of def't, its agents and employés, and in consequence of the negligence and mismanagement of the said Klein the said heavy iron dump was carelessly and negligently thrown down and let fall by said Klein upon and against said plaintiff, by reason whereof he,

the said plaintiff, was jerked down and twisted and greatly hurt and injured, causing and producing a rupture and aneurism of the descending aorta of the plaintiff, so that he was unable to work, by reason whereof he has become permanently injured and disabled for life; that on account of said injuries he was thrown out of employment and is still unable to work; that he has suffered great pain of body and mind and has been put to great expense in trying to be healed and cured of said injuries; that by reason of the premises the plaintiff had and has a cause of action against def't under and by virtue of the statutes of Kansas in such cases made and provided in sec. 1, chapter 93, Laws of Kansas of 1874, which reads as follows: "Section one. Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company (*in this State shall be liable for all damages done to any employee of such company*) in consequence of any negligence of its agents or by any mismanagement of its engineers or other employés to any person sustaining such damage," and by reason of said injury so received he has been and is damaged in the sum of twenty-five thousand dollars, for which sum plaintiff asks judgment and for costs.

T. P. FENLON,
JENKINS & WELLS,
Att'ys for Pl'ff.

32 And afterwards, on the 3rd day of November, 1888, the following entry was made of record:

OTTO WYLER
against
UNION PACIFIC RAILWAY CO. } 1212.

This day comes defendant and files answer.
Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, October Term, A. D. 1888.

OTTO WYLER, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Def't.

Answer to Amended Petition.

Now comes def't and for its answer to the amended petition herein admits that it was at the times mentioned in said petition and now is a railway corporation; admits that on the 3rd day of April, 1883, it had in its employ the plaintiff; admits the existence of the statute therein set forth, and denies each and every other allegation in said petition contained.

Second. And for a second and further defense def't alleges that any injuries which plaintiff may have sustained at the time and place in said petition contained were caused by his own negligence contributing directly thereto.

Third. And for a third and further defense def't alleges that at the time of the alleged injury to pl'ff he was and ever since has been a citizen of the State of Kansas and that def't was at such time and ever since has been a citizen of said State; that at the time of the alleged injury to pl'ff there was and ever since has been a public statute of said State of Kansas commonly known as the statute of limitations; that by the eighteenth paragraph of
33 article third of said statute it was and is provided that "civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued and not afterwards: First, within five years: An action upon any agreement, contract, or promise in writing. Second, within three years: An action upon contract not in writing express or implied; an action upon a liability created by statute other than a forfeiture or penalty.

That by paragraph 25 of said article third it is provided that "when a right of action is barred by the provisions of any statute it shall be unavailable either as a cause of action or ground of defense."

Defendant further alleges that the allegations of said amended petition constitute an action upon a liability created by statute other than a forfeiture or penalty and constitutes an entirely different cause of action than that attempted to be stated in the original petition; that more than three years have elapsed since the accruing of the alleged cause of action in said amended petition set forth before the filing said amended petition; wherefore defendant avers that said cause of action is barred and plaintiff ought not to have and maintain his said cause of action.

Defendant, for a further and fourth defense, alleges that more than five years had elapsed after the alleged accruing of plaintiff's cause of action contained in said amended petition before the filing of said amended petition, and that the cause of action alleged in said amended petition is wholly different from that attempted to be alleged in the original petition; wherefore defendant avers that this cause of action is barred and plaintiff ought not to have and maintain the same against defendant, and defendant prays judgment and costs.

JOHN W. BEEBE,
Att'y for Defendant.

34 Afterwards, to wit, at the March term of said court and on the 4th day of March, A. D. 1889, the following entry was made of record, to wit:

OTTO WYLER
against
UNION PACIFIC RAILWAY CO. } 1212.

This day comes defendant and by leave withdraws its answer to the amended petition and takes leave to file demurrer.

And on Tuesday, March 5th, 1889, the following entry was made of record, to wit:

OTTO WYLER
against
UNION PACIFIC R'Y CO. } 1212.

This day come the parties, by their attorneys, the plaintiff by Wells & Fenlon and the defendant by John W. Beebe; thereupon defendant files amended answer and plaintiff files demurrer and reply to same, and, said demurrer being called for hearing, the same is argued by counsel and submitted to the court

Said amended answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, March Term, 1889.

OTTO WYLER, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Amended Answer to Amended Petition.

Now comes defendant and for its first amended answer to the amended petition herein admits that it was at the times
35 mentioned in the said petition and now is a railway corporation; admits that on the 3rd day of April, 1883, it had in its employ the plaintiff; admits the existence of the statutes therein set forth, and denies each and every other allegation in said petition contained.

2. And for a second and further defense defendant alleges that this court has no jurisdiction of the alleged cause of action set forth in said petition.

3. And for a third and further defense defendant alleges that any injuries which plaintiff may have sustained at the time and place in said petition contained were caused by his own negligence directly contributing thereto.

4. And for a fourth and further defense defendant alleges that at the time of the alleged injury to the plaintiff plaintiff was and ever since has been a citizen of the State of Kansas, and defendant was at said time and ever since has been a citizen of the State of Kansas; that at the time of the alleged injury to plaintiff there was and ever since has been a public statute of said State of Kansas known as the statute of limitations; that by the 18th paragraph of said statute, art. 3, it is and was provided that civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued and not afterwards; that by the third subdivision of section 18 of the Code of Kansas it is provided as follows: "Third, within two years. An action for trespass upon real property, an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the

rights of another not arising on contract and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of fraud."

36 Defendant further alleges that more than two years elapsed after the cause of action set forth in plaintiff's petition and amended petition before the suit was brought. Wherefore defendant says that said action was and is barred by virtue of the statute hereinbefore set forth.

That by paragraph 25 of said article third it is provided that when a right of action is barred by the provisions of any statute it shall be unavailable either as a cause of action or ground of defense.

5. And for a fifth and further defense defendant avers that more than five years had elapsed after the alleged accruing of plaintiff's cause of action contained in said amended petition before the filing of said amended petition. Wherefore defendant avers that the cause of action set forth in said amended petition is barred by the statute of Missouri, and plaintiff ought not to have and maintain the same against defendant. Wherefore defendant prays judgment and for costs.

JOHN W. BEEBE,
Att'y for Defendant.

Said demurrer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

OTTO WYLER, Pl'ff,
vs.
THE UNION PACIFIC RAILWAY COMPANY.

Demurrer.

And now comes the said plaintiff and demurs to the 3rd ground of defense in the answer to the amended petition filed herein for the reason that said 3rd ground of defence does not set forth any legal defense to the cause of action set forth in the amended petition herein.

37 THOS. P. FENLON,
JENKINS & WELLS,
Att'ys for Pl'ff.

Said reply is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the District of Missouri.

OTTO WYLER, Pl'ff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Def't.

Reply.

And now comes the said plaintiff and for reply to the second ground of defence set forth in the answer to the amended petition herein filed denies each and every part thereof.

THOS. P. FENLON,
JENKINS & WELLS,
Att'ys for Pl'ff.

And on the 6th day of March, A. D. 1889, the following entry was made of record:

OTTO WYLER
against
UNION PACIFIC R'Y CO. } 1212.

The demurrer to the answer in the above cause having been submitted to the court and taken under advisement, it is now ordered that the same be sustained.

And afterwards, to wit, on Friday, March 8th, A. D. 1889, the following entry was made of record in said cause:

OTTO WYLER
against
U. P. R'Y CO. } 1212.

38 Ordered that Doctors Halley and Luscher be appointed to examine as to the character and extent of plaintiff's injuries and to report their conclusions to this court with all convenient speed.

And at said March term and on Saturday, March 9th, A. D. 1889, the following entry was made of record:

OTTO WYLER
against
UNION PACIFIC R'Y CO. } 1212.

This day come the parties, by their attorneys—the plaintiff by Jenkins & Wells and T. P. Fenlon, and the defendant by Beebe and Monroe—and, this cause being regularly called for trial, it is ordered that a jury come, to wit, J. G. Smith, Austin Farr, J. E. Hitt, S. E. Roberts, William Wild, Warren McCullogh, J. H. Dorset, W. C. Black, John C. Castell, W. C. Overstreet, W. R. Thompson, William Williams; thereupon testimony is heard, and at the conclusion thereof the cause is argued by counsel and submitted, and

after hearing the charge of the court the jury retire to consider what verdict they shall render, and after due consultation the jury come into court and report that they are unable to agree on a verdict; thereupon a juror is withdrawn, and it is ordered that the remaining jurors be discharged from the further consideration of this case.

And on the 11th day of March the following entry was made of record:

OTTO WYLER
against
UNION PACIFIC R'Y CO. } 1212.

This day again come the parties, by their attorneys; whereupon it is ordered that this cause be continued till next term.

And afterwards, at the September term of said court and on Thursday, September 5th, 1889, the following entry was made of record:

39

OTTO WYLER
against
UNION PACIFIC R'Y CO. } 1212.

This day come the parties, by their attorneys—the plaintiff by T. P. Fenlon and Jenkins & Wells, and the defendant by John W. Beebe and I. N. Watson—and, this cause being regularly called for trial, it is ordered that a jury come, to wit, G. J. Biggs, George W. Browning, L. L. Higgins, W. B. Rogers, W. E. Gould, William Galloway, W. T. Scott, Charles Thomas, R. N. Feely, H. M. Jamerson, A. McHorn, John Lewis, twelve good and lawful men, who were duly sworn and empaneled to try the issues herein; whereupon testimony of the plaintiff is concluded and the defendant files demurrer to the evidence, and said demurrer is argued by counsel and submitted to the court and taken under advisement.

And on Friday, September 6th, 1889, the following entry was made of record:

OTTO WYLER
ag'st
UNION PACIFIC RAILWAY CO. } 1212.

Again come the parties, by their attorneys, and the jury sworn and empaneled to try this cause as on yesterday; thereupon the hearing is proceeded with and concluded, and after hearing the charge of the court the jury retire to consider what verdict they shall render in the premises, and after due consultation they return in court with the announcement that they are unable to agree upon a verdict herein; whereupon it is ordered that the jury be discharged from the further consideration of this case.

40 And afterwards, to wit, at the March term, 1890, the following entry was made of record:

OTTO WYLER
against
U. P. R'Y Co. } 1212.

The motion for costs being now called for hearing and submitted, it is ordered that the same be granted. Comes then the defendant and files motion for special venire.

And on Tuesday, March 4th, 1890, the following entry was made of record:

OTTO WYLER
ag'st
UNION PACIFIC R'Y Co. } 1212.

Upon plaintiff's motion this cause is continued and it is ordered that plaintiff give security for costs on or before the first day of next term.

And afterwards, at the regular September term of said court and on the 9th day of September, A. D. 1890, the following entry was made of record:

OTTO WYLER
ag'st
UNION PACIFIC RAILWAY Co. } 1212.

Defendant withdraws motion for special venire.

Afterwards, to wit, on Friday, September 12th, A. D. 1891, the following further entry was made of record:

41 OTTO WYLER
ag'st
UNION PACIFIC RAILWAY Co. } 1212.

This day come the parties, by their attorneys—the plaintiff by Jenkins & Wells and Fenlon, and the defendant by Beebe and Watson—and, this cause being regularly called for trial, it is ordered th-t a jury come, to wit, W. T. Irvine, J. J. Humphrey, W. T. Johnson, William Taubman, Jeremiah Beaty, Jacob Minch, T. J. Brown, L. F. Clark, H. Bonney, S. B. Neyman, G. W. Jordan, J. W. Fife, twelve good and lawful men, who were duly sworn to try the issues herein, thereupon testimony is heard, and, the hearing not being completed at the hour of adjournment, further proceedings are postponed till tomorrow morning.

And on Saturday, September 13th, 1890, the following entry was made of record:

OTTO WYLER
against
UNION PACIFIC RAILWAY Co. } 1212.

This day again come the parties, by their attorneys, and the jury sworn to try this cause as on yesterday, thereupon further pro-

ceedings are had and the cause is submitted to the jury upon the arguments of counsel and the charge of the court and the jury retire to consider what verdict they shall render in the premises, and after due consultation the jury return into court the following verdict, to wit:

"We, the jury, find the issues for plaintiff and assess his damages at $10,000.00.

J. J. HUMPHREY, *Foreman.*"

It is therefore considered by the court that the plaintiff, Otto Wyler, recover against the defendant, The Union Pacific Railway Company, the said sum of ten thousand dollars ($10,000.00), so found to be due by the jury, and have thereof execution.

42 And afterwards, on the 17th day of September, A. D. 1890, the following entry was made of record in this cause:

OTTO WYLER
ag'st } 1212.
U. P. R'Y Co.

Comes defendant, by attorney, and files motions in arrest of judgment and for a new trial.

And on Saturday, September 20th, 1890, the following entry was made of record, to wit:

OTTO WYLER
ag'st } 1212.
UNION PACIFIC R'Y Co.

This day come the parties, by their attorneys, and the motions in arrest and for a new trial are argued by counsel and submitted to the court.

And on the 22nd day of September, A. D. 1890, the following entry was made of record:

OTTO WYLER
ag'st } 1212.
UNION PACIFIC R'Y Co.

Plaintiff files motion to have Doctor Luscher's fee taxed as costs.

And afterwards, to wit, on Monday, January 5th, A. D. 1891, the following entry was made of record:

The following orders of Judge Caldwell are this day received and recorded:

OTTO WYLER
ag'st
UNION PACIFIC RAILWAY COMPANY. } 1212.

43 On this day comes the defendant, by John W. Beebe, its attorney, and files its motion in arrest of judgment and its motion for a new trial in this cause, which motions the court takes under advisement, and it is ordered that all proceedings on the judgment in this cause be suspended, and that said judgment shall not be final unless and until the motions aforesaid are overruled and denied.

And, on motion, time until the 6th day of January, 1891, is given to the defendant to prepare and settle the bill of exceptions in this cause.

This order having been made on the 17th day of September, 1890, but not then entered, is entered of record now for then.

(Signed) HENRY C. CALDWELL,
Circuit Judge.

OTTO WYLER
vs.
UNION PACIFIC RAILWAY COMPANY. } 1212.

And now, the court, having fully considered the motion in arrest of judgment and the motion for a new trial filed by the defendant in this cause, doth overrule and deny said motions, and doth order and adjudge that the judgment entered on the verdict in this cause on the 13th day of September, 1890, shall stand as the final judgment of the court in this cause as of this date.

And thereupon the said defendant presented to the court its bill of exceptions in this cause, which, being found correct, is signed and sealed by the judge and ordered to be filed and made part of the record herein.

The amount of the supersedeas bond is fixed at the sum of fifteen thousand dollars.

(Signed) HENRY C. CALDWELL,
Circuit Judge.

Said bill of exceptions is in words and figures as follows:

44 In the Circuit Court of the United States for the Western District of Missouri, Western Division, September Term, 1890.

OTTO WYLER, Plaintiff,
vs.
UNION PACIFIC RAILWAY COMPANY, Defendant. }

Bill of Exceptions.

The above-entitled cause came up for trial at the September term, 1890, of said circuit court, to wit, on the 13th day of September, 1890, and was tried before the Hon. H. C. Caldwell, circuit judge,

holding said circuit court; at which trial the following proceedings were had. The plaintiff, to sustain the issues on his part, introduced the following evidence, to wit:

The plaintiff, Otto Wyler, through an interpreter duly sworn in said cause, *and* testified as follows, to wit:

FRANK MUELSCHUSTER, being first duly sworn as an interpreter, interpreted the testimony of Otto Wyler as follows:

OTTO WYLER, called as a witness on his own behalf, being first duly sworn, testifies as follows:

Direct examination.

By Mr. WELLS:

Q. State your name, age, and place of residence.

A. Otto Wyler; Armourdale, Wyandotte county, Kansas; forty-five years of age.

Q. Where did you reside in 1883?

A. In Armourdale, Kansas.

Q. In what business were you engaged in 1883 in Armourdale, Kansas?

A. Boiler-maker.

Q. How long have you been working at that business?

A. Since 1861, as a boiler-maker.

45 Q. Did you serve a regular apprenticeship at your business?

A. Five years as an apprentice.

Q. Where did you serve your apprenticeship?

A. In Switzerland.

Q. What were you receiving as wages in the month of April, 1883?

A. Two dollars and seventy-five cents a day.

Q. How long had you received wages at that rate?

A. About two years.

Q. Who were you working for in the year 1883?

A. The Union Pacific Railway Company, at the round-house in Armstrong, Kansas.

Q. How long had you been working for the Union Pacific Railway Company at Armstrong, Kansas?

A. I commenced in September, 1880.

Q. State whether or not the Union Pacific railway ran through the county of Wyandotte, Kansas.

A. Yes, sir; it runs through Armstrong.

Q. Has it done so ever since?

A. Yes, sir.

Q. States whether or not the Union Pacific railway runs through or into the county of Jackson, Missouri.

A. Yes, sir; it runs to Kansas City.

Q. What were you doing for the Union Pacific railway in the month of April, 1883?

A. Repair-work on boilers during that period.

Q. Describe what kind of a place you were required to work in in repairing boilers for the Union Pacific Railway Company in 1883.

A. At the round house, on the fire-box, in a pit.

Q. Describe how it was made for the purpose of repairing the boilers.

A. A pit about four feet in depth, running lengthwise through where the engine stands in the round-house, four feet in depth.

46 By the COURT:

Q. How much in width?

A. About as far as between the rails.

By Mr. WELLS:

Q. How long was that pit?

A. Something longer than the engine.

Q. Where did the engine stand while he was repairing boilers for the Union Pacific Railway Company?

A. In the round-house, just over the pit.

Q. Just over the pit?

A. Yes, sir.

Q. Now, if anything occurred to you while you were repairing boilers for the Union Pacific Railway Company in the month of April, 1883—I will change that question. Who was working with you in repairing engines in April, 1883, for the Union Pacific Railway Company?

A. A man by the name of Klein.

Q. How long had this man Klein been assisting you in the repairing engines?

A. Only for that day.

Q. What day?

A. The 23rd day of April, 1883.

Q. How long had you known this man Klein?

A. Since I was working there; since 1880.

Q. Were you well acquainted with this man Klein?

A. Yes, sir.

Q. How tall a man was he?

A. About five feet ten; about my height—my size.

Q. Was he a strong, muscular man or a weak man?

A. He was a strong man; weighed about one hundred and seventy pounds.

Q. What were you and this man Klein doing on the 23rd day of April, 1883?

A. We wanted to put the fire-grate in the box.

Q. Were they or not working in one of these pits under an engine of the Union Pacific railway?

A. Yes, sir.

Q. What part of the engine had you been repairing that day?

47 A. The under part of the fire-box—the staybolt and mud ring. They were eating and had to be fixed.

Q. Did you have to remove any part of the works in order to make these repairs? State what they were.

A. Yes, sir; we had to take away the ash pan and then take out the grate.

Q. What was the size and weight of these grates which were taken out?

A. The grate was thirty-six inches in length and fifteen inches in breadth—width—and about an inch and a half in thickness.

Q. What would they weigh?

A. They would weigh about a hundred and fifty pounds.

Q. Is that the shape and about the form of the grate, that piece of card-board you have there in your hands?

A. Yes, sir; that is the shape.

Q. How many of those grates were you required to take out in order to make the repairs on the engine on that day?

A. We had to take out all of them, but there was only — of them that weighed that much.

Q. Which one of them weighed that much?

A. There was only one that weighed that much.

Q. Was the other grate which you took out of different shape than that?

A. Yes, sir.

Q. Were the others lighter or heavier than that?

A. They were lighter.

Q. State what occurred there after repairing the boiler as you were required to do.

A. While I was picking up the iron—this grate—I and my partner lifted it from the floor to bring it—to place the grate in the box (witness indicating).

48 INTERPRETER: He is just showing, illustrating, the way he has to take it in his arms, and then he has to take the other side of it. While he was putting it in the box his partner let go of it.

By the COURT:

Q. That is, while he was lifting the grate?

A. Yes, sir.

Q. What do those projections represent?

A. They represent the — in position under the box.

Q. How did his coworkman have hold of it?

A. It laid this way (indicating). That is the way it laid in the bottom of the pit (indicating).

INTERPRETER: You took it on this side——

WITNESS: Yes, sir.

INTERPRETER: And the other man on that side (indicating)?

WITNESS: Yes, sir.

INTERPRETER: The other man took it on the other side in lifting

it. This is where the ashes of the engine is turned out. While they were lifting this here—he being in the position he gives now, the other man on the other side—by lifting it up he was just about putting his part into the grate, and where the other man lifted it he let go of it.

Q. Just get up there before the jury and show the jury how that occurred.

A. (Witness puts his umbrella across his own shoulder and the interpreter's shoulder, the two standing back to back.)

INTERPRETER: This part had to go into the pit of the engine. (Witness stands with his back to the interpreter.)

Q. Now, then, what occurred? Take a hold of it just as he did the other.

Mr. BEEBE: Better reverse it and let him show how the other man did.

The COURT: No; I think you had better let this man show
49 what he did himself.

The INTERPRETER: The other man let it go.

The COURT: You let go and tell him you are going to let go as the other man did, and tell him he must then show the jury what happened.

(Witness here indicates by sitting down on the floor in a reclining position.)

INTERPRETER: The weight of the iron pressed him down.

By Mr. WELLS:

Q. Ask him — he fell down or slipped down.

A. Fell that way.

Q. Ask him if held on his piece just as he does now.

A. Yes, sir; he had it in his hand when he was down (meaning witness).

Q. Ask him if he can make the motion now as well as he could then; if he is able to do it; that is what I want to get at. I didn't want to ask him a leading question. Is he stout enough now to go down just like he did then, or is he weaker now than he was at the time of the injury?

A. (by the interpreter). Oh, yes; he is weaker now.

Q. Take that umbrella, now, and fall just like you did then at the time the thing took place.

A. I cannot; it hurts too much.

Q. Did the weight of the thing crush you down, or did you fall from any other cause?

A. It was the weight that made me fall.

Q. If the other end of the grate had been held up would you have fallen and been hurt?

A. No, no.

Q. What did Klein say when he turned it loose?

Counsel for defendant objects to the form of the question be-

cause it assumes the witness has already said that Klein turned it loose.

Mr. BEEBE: The witness didn't say anything of the kind; I want the witness's own language.

50 Objection overruled and exception taken.

A. (Witness putting a hat upon his head.) He put his hand upon his head and said, "God damn son of a bitch," and walked out.

Q. Please repeat that.

INTERPRETER: The witness says the man, the other, put his hand on his head and ran out and cried, "God damn son of a bitch!"

Q. Did you see him as he ran out?

A. Yes, sir; I saw him go out.

Q. Did he come out into the pit again to assist you, or what became of him?

A. He never came back that evening; he didn't come back that evening any more.

Q. What effect did your falling down with that piece of iron in your arms have upon you?

INTERPRETER: He says he had a fainting spell and was hardly able to walk home after that occurred.

Q. How long after that before you went home?

A. About an hour after that.

Q. Where did you stay during that hour?

A. Alongside of the engine, sitting on a box.

Q. Out of the pit or in the pit?

A. Outside of the pit.

Q. What immediate effect did it have on you?

A. It caused me to be unable to work any further; sort of ruptured me.

Q. Ruptured you so you were unable to work?

A. Yes, sir.

Q. Did you suffer much from the fall after that?

A. Yes, sir; I suffered very much.

Q. How long did you suffer very much from that injury?

A. About three or four years.

Q. Did you undertake to labor any at your trade after that; and, if so, what was the result?

A. Yes, sir.

Q. What was the result of your efforts?

A. I couldn't work at my trade; I always got weaker.

51 Q. How much of the time since your fall on the 23rd of April, 1883, have you been able to do manual labor at your trade?

A. About one year. I could occasionally go to the shop and do some light work, but was laid up frequently.

Q. About what year was that?

A. July, 1884, I quit.

Q. July, 1884, you quit?

A. Yes, sir.

Q. Why did you quit trying to do work after July, 1884?

A. I was so weak that I was unable to attend to any work at all; fainted frequently and was laid up.

Q. Were you treated by a physician after your injury; and, if so, what physician?

A. I was treated by a physician by the name of Dr. Cory.

Q. Has any other physician treated you besides Dr. Cory since the time when you were injured?

A. I have been examined by Dr. Jesserich in 1884, at the request of Dr. Cory.

Q. What advice, if any, did your physicians give you with reference to your ability to labor at your trade?

Counsel for defendant objects to the question as incompetent, irrelevant, and immaterial. Objection sustained.

Q. Have you suffered much from the injuries received at that time since that and down to what time have you suffered, if you have suffered?

A. I have suffered continually up until today.

Q. Up till today?

A. Yes, sir.

Q. Are you able now to do any kind of hard labor?

A. No, sir.

Q. What effect with reference to your rest and sleep did the fall have at the time you received the injury?

A. Continual restlessness; pain in my body frequently.

Q. Show to the jury on your person where that pain is that you suffer from.

A. (Witness putting his left hand near and a little above the left groin.) *A.* A little above the left groin.

52 Q. Have you done any kind of physical labor since you were advised by your physician what was the matter with you?

A. I haven't done any labor and cannot do any labor.

Q. What time was that advice given?

A. Since the day this happened the physician has advised me not to do any hard labor.

Q. Have you been examined by physicians appointed by this court; and, if so, what are the names of those physicians?

A. Yes, sir; I was examined by Dr. Lusher, Dr. Jesserich, and Dr. Halley.

Q. Doctors Halley, Lusher, and Jesserich?

A. Yes, sir.

Q. What was the condition of that pit at the time this injury took place?

A. It was in poor condition.

Q. In what respect was it in poor condition?

A. There was water in the pit and the canal that drained the pit was rotted through and caved in and the water didn't drain off.

Q. Did you stand in the water or did you stand on something else in the pit?

A. We had blocks and some boards on them.

Q. How many feet was it from the top of the board you were standing on up to the bottom of the engine just over where you and Klein were standing?

A. About five or five and a half feet.

Q. How tall a man was Klein?

A. About as big as me; five feet ten.

Q. Did you see or hear anything knock the iron out of Klein's hands?

A. No; I couldn't see that, because I was back of him.

Q. Was there anything there that you did see that could have knocked it off his shoulders?

Mr. BEEBE: It seems to me that is calling for a conclusion of the witness. I think if the witness would describe the pit it
53 will be for the jury to say.

Objection overruled. Counsel for defendant excepts.

Q. (Question read.)

A. No, sir.

Q. Did anything while you were in there repairing the engine that day knock a piece of iron out of your arms while you were lifting it?

A. No, sir.

Q. When did you see Klein again after he ran out of that pit?

A. Mr. Klein called on me the next day between ten and eleven o'clock.

Q. Did you see Klein's head the day he called on you, the day after the thing occurred?

A. Yes, sir.

Q. Did Klein have his hat on his head when he was at work there lifting that piece of iron; and, if he did, what kind of a hat did he have on?

A. Yes, sir.

Q. What kind of hat was it?

A. A soft felt hat, something similar to this. (Witness puts a soft hat on his head.)

Q. The next morning when you saw Klein, when he called to see you, was there any bruises or bumps or anything of that sort on his head?

A. No, sir.

Q. Were you able to see well at that time?

A. Oh, yes. He came to me and held his hand there towards me, and got me to put my hand on his head.

Q. Did you feel anything on his head—any bruises or bumps?

A. I didn't see or feel anything. I didn't see anything or feel anything.

Q. What expense were you put to on account of the injury which you received at that time?

A. It cost me about nine hundred dollars for medicine and doctors' bills.

Q. Were you put to any other expense besides medicine
54 and doctors' bills on account of the injury?

A. Oh, yes; I had other expenses, a hundred and twenty-five dollars for court expenses, and twenty-five dollars again for court expenses, and then fifty dollars for Dr. Lusher.

Mr. BEEBE: I don't suppose what he has paid into court here would be considered damages in this case.

Mr. WELLS: I didn't know he was going to bring in that; of course we didn't care anything about that.

Q. Did Klein know the size and dimensions of that pit where you were working?

A. Yes, sir; I think so.

Q. How long had Klein worked there about the round-house?

A. Only for that day that he helped me.

Q. You understand me as asking if he worked for you. Had he worked for any one else around the round-house at that time?

A. Oh, yes; he worked there previously.

Q. What kind of work had Klein done about the round-house prior to that time?

A. He was a helper.

Q. You state that he was a helper. Explain to the jury what you mean by a helper.

A. A helper is there for the purpose of assisting the mechanics in their several works.

Q. In the pit or elsewhere?

A. All places—all the different works.

Q. Any kind of work that would come up, that would need a man to assist, he was called upon to do?

A. Yes, sir; any kind of work that he was called upon to perform.

By the COURT: Was the ditch that you were working at the time you received your injury necessary to do your work upon and repair locomotives and cars and was it limited to that use?

A. The pit is there for the purpose of all works that are
55 needed on an engine underneath, for several items of repairing and cleaning an engine.

Q. Is this manner of works peculiar to railroad shops and limited to them and to work on locomotives and cars?

A. It is only for locomotives, engine works.

By Mr. WELLS: Did Klein give any notice or warning that he was going to let this fall before turning it loose?

A. No, sir.

Q. Did he know anything about whether it was going to be let fall or not until it did fall?

A. No, sir; I didn't.

Q. When you took this grate out of the engine for the purpose of repairing the fire-box, where did you lay this grate? Did you lay

it right under where you took it out or did you carry it off any distance; and, if so, how far from where it was taken out?

A. We laid it on the floor beneath the fire-box in the pit.

Q. Right underneath where it was taken out?

A. Alongside in the pit, and alongside the fire-box lengthwise.

Q. Did this grate go crossways or lengthways of the engine when it was put up in place?

A. Crossways of the engine.

Q. When it was up in the engine?

A. Yes, sir.

Q. Now, when they took it out and laid it down did they lay it down crossways in the pit or lay it crossways?

A. Just like it was laying in the box—across the pit.

Q. Across the pit?

A. Yes, sir.

Q. When they picked it up then to place it back did they have to move forwards or backwards, or lift it right straight up and put it up in where it belonged?

A. Just lifted it straight from the bottom to the pit into the box.

56 Q. How far did you take that grate from where you picked it up to the place where you were going to put it?

A. Only lifted it up—straight up from the bottom.

Q. What was your physical condition prior to the time of this injury, from the time you can first remember down to that time?

A. I always had been a healthy, stout person—most always enjoyed good health and been hearty and sound up to that time.

Q. How many spells of illness did you have prior to that time?

A. I had always enjoyed good health, with one exception, that I had taken some ice water in 1881, from which I contracted a catarrh.

Q. Had that ever prevented you from laboring at your trade?

A. I had to quit work about five days; that is the only time I ever lost.

Q. How much time from illness had you lost from work at your trade from the time that you finished your apprenticeship down to the time that you were injured, on account of illness?

A. I never was sick at any time.

Q. The question I asked was how much time you had lost from labor on account of illness.

A. On account of sickness I never lost any time, with the exception, probably, of small injuries—sore finger or something like that.

Q. State whether or not prior to the time of your injury you had ever suffered any such pain as you suffered after that time.

A. Never.

Q. When did you suffer that pain last?

A. I have got pain a little now.

By the COURT: Was your employment limited to work on locomotives in pit?

57 A. I had to repair flues, boilers, stay bolts, and mud rings of an engine.

Q. Where did you perform that work?

A. In the round-house at Armstrong.

Q. Did you ever work elsewhere in this country at the same employment?

A. No, sir; not for this company.

Q. You did work, then, for this company outside of the round-house?

A. Oh, yes; in 1881 I worked at the boiler shops of this company.

Q. State the different places at which you worked.

A. — and building tenders.

Q. Tell all the work you ever did and where you did it.

A. The first two years I was in the boiler shop and the balance of the time in the round-house.

Q. When you worked in the boiler shop what did you do?

A. Building tenders, water tanks.

Q. When you worked in the round-house what did you do?

A. I did patchwork, quick work, quick patchwork, on the machinery and engine, when anything had to be done quick.

Q. Did you work on anything other than locomotives in the round-house?

A. No, sir.

Q. Did you work on locomotives that had steam up and could be moved by steam at the time you worked on them?

A. Oh, yes; very frequently.

By Mr. WELLS: Did you during your engagement, up to the time of the injury, at frequent times work on cars inside of the shop over the pit, and did you also work outside of the shop on cars on rails of the company when you were called upon to do so?

A. Not in Armstrong. In Armstrong I was only working in the round-house.

58 Q. Didn't you work outside of the round-house on the rails when you were ordered by your superior officer to do so?

A. Whenever an engine was outside I was called outside to work outside, too.

Q. What was the *guage* of the Union Pacific railroad?

A. I cannot positively state that. It is four or four and a half feet—something like that. I don't know exactly.

Q. It wasn't a narrow-*guage* railroad?

A. Oh, no.

Q. What has been the extent of your suffering- since the time of this injury? Have they been little or have they been severe?

A. Generally I have suffered intense pain as a general rule. Sometimes it would let up for a time, and at other times it would increase again.

Q. Are there intermissions in this suffering or is it constant all the time?

A. It is almost continuously. Once in awhile it lets up for an hour or two.

Q. How have you maintained yourself and family since the 23rd of April down to this time?

A. By selling my homestead and by my children assisting me during that time.

Q. How much money have you been able to make yourself since 1883 by the labor of your own hands?

A. Nothing since I was injured.

Cross-examination.

By Mr. BEEBE:

Q. When did you come to this country?

A. August, 1880.

Q. Did you come to Kansas City first or did you go elsewhere?

A. I came direct to Atchison, Kansas, and from there here.

59 Q. When did you come to Kansas City?

A. During the latter part of September, 1880.

Q. Have you ever tried to learn the English language?

A. Yes, sir; I understood it a good deal regarding things in my profession.

Q. Have you tried to learn it so as to talk it?

A. I can talk some.

Q. You have talked some, then?

A. I have forgotten what I had learned since my sickness. I never got out of my house, and hence I forgot it, what I had learned.

Q. Did you know how to speak the English language before you were hurt?

A. Not much; only the necessary language to use in the work-shop there.

Q. When did you go into the employ of the Union Pacific Railway Company?

A. The latter part of September, 1880.

Q. Who hired you?

A. The boiler boss, Mr. Talpey.

Q. What did he hire you to do?

A. He engaged me to go into the boiler shop to build tenders.

Q. Was your work confined to the boiler shops?

A. The first two years it was.

Q. You did nothing but the work of a mechanic in making tenders for engines during the two years you speak of?

A. Oh, yes; other work, too.

Q. What other work?

A. On the fire-box, on tenders, and other things pertaining to boilers.

Q. You were assisting in making those?

A. I built them myself.

Q. You made them yourself?

A. Yes, sir.

60 Q. How did you happen to go into the round-house to work?

A. They called on me the time the Wabash engines went into the round-house, and they needed a separate man for that business in the round-house, and they called upon me to take a position there at the round-house.

Q. What was your business at the round-house, and what were you employed to do there?

A. To do the running work that I was called upon to do when the engines came in, and had to go out again in a short time, just to do the casual running work.

By Mr. FENLON: To do the regular running work?

A. Yes, sir.

By Mr. BEEBE: That is, whenever an engine came into the round-house for repairs it was your duty under your employ to repair it?

A. It was my duty to look after the engine, and if any work was necessary I was to do it.

Q. Was that the extent of your employment or was that all you were employed to do when you went into the round-house?

A. Yes, sir.

Q. How far was the round-house from the main track of the Union Pacific railway?

A. It is right close onto the main track.

Q. How far?

A. About fifty feet.

Q. How do they get the engines into the round-house?

A. Run them on a turn-table.

Q. How far is the turn-table from the shop?

A. Right close onto it, close by it.

Q. Just state to the jury when they want to repair an engine what they do, how they bring it in, and what they do with it in the round-house.

A. When an engine is put onto the turn-table to be placed in the round-house it is generally that the engine is to be wiped out, cleaned, and repaired, whenever there is any repair to be done on an engine.

61 Q. Where are the repairs made—on the round-house or outside?

A. In the round-house.

Q. What do you mean by washing it out before it goes into the round-house?

A. They wash out the boiler—the stones in the boiler.

INTERPRETER: If I understand it right, that is the definition of what he said—squirt it out with a hose.

Q. Do they run the engines into the round-house by the power of the engines themselves, or how do they get the engines into the *power*-house?

A. They always have steam up.

Q. What do they do with the engine; do they run the engine in with the steam it has itself—its own steam?

A. Generally. If they have no steam up on their engine another

engine puts it in. Generally they run it in with their own steam; if not, another engine pushes them in.

Q. Who does that work?

A. Either the engineer himself of the engine or the boss of the round-house.

Q. When does the duty begin to repair; after it is placed over the pit or before?

A. Whenever the engine stands at its place and the water is out of the boiler.

Q. Who lets the water out before you begin to work on it?

A. An extra man there who does the work; a helper.

Q. Then the steam is let out of the engine before you repair it?

A. Yes, sir.

By the COURT: Is that always the case; did you never repair locomotives with steam in them?

A. Sometimes they repair them with the steam on.

62 Q. Where do they do that, and what kind of repairs?

A. Sometimes, when it is only a small repair necessary in the fire-box, they can repair them even while the steam is in the engine.

By Mr. BEEBE:

Q. Do they repair the engine under any other circumstances with the steam up?

A. It depends upon what repairs is needed. I cannot explain it myself.

Q. Are there any other repairs than those you have mentioned with reference to the fire-box that are made with the steam up with an engine in the round-house?

A. If there is some repair necessary on the engine it can be done without letting off the steam, but I cannot say what.

Q. Did you ever repair an engine, that you remember of, when the steam was up except to fix the fire-box?

A. Never worked an engine—never repaired an engine when the steam was up. The only work I ever performed on an engine at all was on the fire-box and on the boiler. That is the only work I have ever performed at all.

Q. Did you ever perform that work while steam was up?

A. Yes; frequently.

Q. Now, was there danger in working about the engine with the steam up?

A. Yes, sir; frequently.

Counsel for plaintiff objects to the question as incompetent, irrelevant, and immaterial, not cross-examination, and calling for an opinion of the witness.

Objection sustained. Counsel for defendant excepts.

Mr. BEEBE: I will put the question in a little different form, if the court please:

Q. While you were repairing an engine in the round-house was

there any opportunity for you to receive any injury by reason of the steam being up in the engine?

63 Counsel for plaintiff objects to the question as incompetent, irrelevant, and immaterial, not proper cross-examination, and calling for an opinion of the witness.

Objection overruled.

A. I have worked on it frequently, but of course there was more danger than when there was no steam—danger that an explosion might happen.

Q. Was there any steam up on this engine that you worked on this particular day when you were hurt?

A. No, sir.

Q. It was what we call the dead engine, was it?

A. Yes, sir.

Q. How many times have you testified to this case before?

A. This is the third time.

Q. Did you intend upon this occasion to give the same testimony in regard to the acts that you did on the former occasion?

A. Yes, sir. I couldn't say anything else.

Q. Are you willing to adopt and take a part of the testimony that has been given on this trial—that which you gave on the former trial?

Counsel for plaintiff object to the question as improper, incompetent, irrelevant, and immaterial.

The COURT: I think that is an improper question; that is too uncertain. It proves nothing. You may ask him if he testified on the former trial as he has on this. That is too general. If you think he has testified differently you may examine him on the matters on which you think he has testified differently.

Counsel for defendant excepts to the ruling of the court.

Q. Did you state on the former trial that the accident took place in the same manner you have now stated on this occasion?

A. Yes, sir.

64 Q. I will ask you whether or not on the first trial of this case you were not asked this question and made this answer:

"Q. State just what happened on the day that you allege you received the injury.

A. Well, we had to lower the ash pan and grate and I had to take out the grate and ash pan to repair the leak in the ash pan and then replace them again.

Q. Well, state what occurred to you when you were returning the grate to its place.

A. I was lifting this iron that this man Klein—I mean the grate—and as I got this in position (witness here illustrated), the position I have shown, and having the iron, my helper's head struck against something and he dropped the grate and let the whole weight on me in my position. When the other man left the grate it left me in that position.

Q. In what manner did your helper drop his end of the grate and what did he say, if anything, at the time?

A. He struck his head and dropped it and said something—'God damn son of a bitch,' or something—and left it."

That is a pretty long question to put to the witness, if the court please, but I will ask the interpreter to read it to the witness and ask him if he did so swear on the former trial.

Mr. FENLON: He has sworn exactly the same thing now.

Mr. BEEBE: He has done nothing of the kind, and I object to the remark of Mr. Fenlon before the jury.

Mr. FENLON: We are perfectly willing to admit that he testified the same thing before.

Mr. BEEBE: If the gentleman will admit that he swore to that on a former trial I will not ask this witness any more.

Mr. FENLON: We admit that the questions and answers you read there were the questions and answers testified to on the former trial of this case.

Mr. BEEBE: Very well.

Mr. FENLON: We admit that it is a true transcript of what he swore to on a former trial, and further admit that that transcript shows that on cross-examination he stated he did not see
65 it, and then the point was made that it was incompetent for him to say so because he didn't see it.

Q. How long had you been in the pit that day before you were hurt?

A. All that day.

Q. What time in the afternoon was it that the accident happened?

A. Half past four.

Q. When the iron fell was your back to your helper Klein's back?

A. We were standing back to back.

Q. Then you didn't see the iron slip out of your helper's hands or off his shoulder, did you?

A. No, sir.

Q. How that happened you don't know?

A. No; I can't say that.

Q. You don't know what caused it to fall?

A. No.

Q. Did he use the language that you speak of as he was going out of the pit, did he not?

A. Yes, sir.

Q. In running out he used that language?

A. Yes, sir.

Q. Did he have his hand on his head when he ran out?

A. He had his hat on and he had his hand upon his hat on his head.

Q. Did he hold his hand on his head as if he were running out in pain from having hit his head?

A. I think not. I think it was a habit of his.

Q. Did you ever see him run out of the pit before?
A. No, sir.
Q. Show the jury how he ran out of the pit.
A. (Witness here indicates by getting up, putting on his hat, and walking away.)
Q. Did he stand up as you have shown?
A. He ran away; he was already running when I was still lying down in the pit.
66 Q. Did he stand up as you have illustrated to the jury when he ran out?
A. There was no room in front and he ran out that way.
Q. Did he run out in the manner you have illustrated?
A. Yes, sir.
Q. Now, you say the next morning you saw Klein?
A. Yes, sir: he came to visit me about ten o'clock the next morning.
Q. Why did he show you his head?
A. I had told my boss about Klein's actions.
Q. What is that?
INTERPRETER: The witness says he had told his boss about Klein's actions in dropping the grate and running away from him, and Klein and the boss had some words on account of that, and the next morning Klein called upon him — his head where he had hurt himself in the head.
Q. He claimed, then, did he, that he had hurt himself in the head?
A. Yes, sir; he said he had hurt himself—he had hurt his head.
Q. Did you believe it?

Counsel for plaintiff object to the question as incompetent.

Mr. BEEBE: I will promise the court that the court will see that it is entirely competent.
The COURT: Well, go on.

Q. Did you believe what he said?
A. I saw that it wasn't very bad.
Q. You saw that it wasn't very bad?
A. Yes, sir.
Q. Did you think at that time that his striking his head there caused him to drop the grate? I mean the next day when you saw him, did you think that was the cause of it?

Counsel for plaintiff object to the question as incompetent, irrelevant, and immaterial.

67 Mr. BEEBE: Mr. Wyler made a written statement to the railroad company that the cause of this iron falling was that it struck his helper's head. Now in his testimony before on the trial of this case he tried to dispute that, and I said when he made the statement that he didn't know what he was making, or something of that kind. Now I want to see if the very day after that he believed that that was so in order to connect that with the papers to show that that was his impression at first; and he, there-

fore, when he came to make his report to the company was fully cognizant of just what he was doing.

The COURT: All this class of questions will be ruled out until you introduce that paper.

Mr. BEEBE: Well, I will do that right now.

Q. Is that your signature?

Mr. FENLON: It is admitted that it is his.

A. Yes, sir; that is my signature.

Mr. BEEBE: This paper is dated September 25th, 1884.

Q. State whether or not you stated upon a former trial that you first wrote out the statement in German and that the interpreter here then translated it into English, and whether you didn't state when the interpreter read the translation that it was a correct one as to the fact, all except the last clause.

A. My wife had written that down in German.

Mr. FENLON:

Q. The question was, didn't he so testify in the former case? You haven't put it to him exactly as counsel asked you to.

The COURT: It is exceedingly difficult to examine a witness through an interpreter where such long interrogatories are propounded. I think, Brother Beebe, you had better shorten it.

Mr. BEEBE: I will state, if the gentlemen on the other side are willing, that I will not cross-examine him at all, but use his
68 former testimony in the case, and then compare it with his testimony as given now; but otherwise I have to examine him particularly and in detail.

Mr. FENLON: We have no objection to admitting that that transcript is the true transcript, Mr. Beebe.

Mr. BEEBE: I know it is a true transcript—both of these; one is upon one trial and one is upon the other, and both are genuine.

Mr. FENLON: You want to introduce both as contradictory evidence as to what his evidence is now?

Mr. BEEBE: Yes, sir.

Mr. FENLON: I am willing to admit that these are both true transcripts of what he swore to before.

The COURT: Is that what you want?

Mr. BEEBE: Yes, sir.

The COURT: That shortens it.

Mr. BEEBE: Now I will read this to the jury. (Ex. A.)

Mr. FENLON: That is not cross-examination. We have not rested our case. Surely you haven't a right to offer any independent evidence now.

The COURT: It is not offered as independent evidence. It is offered with a view of either impeaching or discrediting the credibility of your witness, and that is proper on cross-examination. The objection will be overruled.

Mr. FENLON: Well, if that is the purpose, I suppose it is proper cross-examination.

Counsel for defendant here reads in evidence to the jury as follows:

"ARMOURDALE, KAS., *Sept.* 25, 1884.

To whom it may concern:

In the spring of 1883 the undersigned received order to fix the mundering and stay bolt in engine No. 5, and to accomplish the same I was compel-ed to remove the ash pan and grates of
69 said engine. All this work had to be done in the pit*t*. The culvert to drain the water from said pit*t* had rotted and caved, and consequently the water would remain in the pit*t* in that condition—water standing eight inches in de*b*th. I was compel-ed to use blocks and boards so that I could possibly work, but by placing said blocks & boards in pit*t* the place to work in became so inconvenient that the work had to be done in a st*u*ping and bending position, and just as we were in the act of placing the front grates, the heaviest of all, my helper, in consequence of the small working space, come in contact with mundring, thereby causing him to drop his hold on said grates, and the whole weight of said grates, being concentrated on myself in as aforesaid st*u*ping position and there and at that time, caused an internal injury, which will for lifetime disable me to follow my usual avocation.

Had the pit*t* been in good order and we would have had the proper space to perform our duty, the result would have not been as it now is.

Respectfully, OTTO WYLER,
Boiler-maker."

Q. Was Klein, when he was showing you his head the next morning, claiming that he was not in fault?

Counsel for plaintiff object to the question as incompetent, irrelevant, and immaterial and not cross-examination.

Objection overruled and exception taken.

A. It wasn't his fault. He said that he had run his head against something above, and that was the cause of it dropping.

Counsel for plaintiff moves to strike out the answer as not responsive to the question.

The COURT: Ask him if he means to say that Klein said it was not his fault, or does he say that he knows that it was not his fault.

70 INTERPRETER: As I understood him, he says Klein said that.

Mr. FENLON: That is all right. I withdraw my objection to the answer.

Q. Now, did you think that Mr. Klein at that time was telling the truth?

Counsel for plaintiff objects to the question as irrelevant, incom-

petent, and immaterial. Objection sustained. Counsel for defendant except.

Q. Did you go back to work for the Union Pacific Railway Company after you got hurt; and, if so, how long after did you work for the company?

A. I did go back to work for the company and worked until July, 1884.

Q. How much of the time did you work for the company?

The INTERPRETER: Do you mean how much time between the time?

Q. Yes; how much of that time?

A. I can't tell exactly how much work, how much time. I made but about half the time.

Q. Did you work with Klein after that time?

A. No, sir.

Q. How much did you work with him before this injury?

A. At the round-house he had never worked with me before that day, but at the boilerhouse he had worked with me very often—quite frequently.

Q. Doing what?

A. He helped me to build tenders.

Q. You know him quite well, then, of course?

A. Yes, sir.

Q. Were you on friendly terms with him and he with you?

A. Yes, sir; we were friends.

Q. How soon was it after you left the employ of the company that you placed this case in the hands of an attorney to bring a suit against the road?

71 Mr. FENLON: It is no legitimate issue in this case as to when he placed his case in the hands of an attorney. All of the facts on which we are entitled to recover are alleged in this petition. Whether they be true or not is the only legitimate thing to be submitted to this jury. They state our cause of action. As to whether this witness was advised to bring this action or not, it is entirely incompetent and irrelevant.

The COURT: All this testimony is intended to affect the credibility of the witness or to weaken his evidence. That is the object of it. For that purpose it is proper.

Mr. BEEBE: I asked him when he placed his case in the hands of an attorney.

A. In the month of October, 1884.

Q. Do you remember what time during the month—about what time?

A. I can't tell exactly.

Q. You had sent this statement to the company previous to the time you went to a lawyer, had you not?

A. Yes, sir.

Q. You did that of your own free will, did you not? You were not required to do it by the company?

The INTERPRETER: You refer to this writing?
Mr. BEEBE: Yes, sir.

A. Yes, sir.
Q. Shortly after you went to an attorney to put your case in his hand—shortly after you sent the letter you went and placed your case in an attorney's hand?
A. Yes, sir.
Q. Who went with you, and did you state the facts to the attorney at that time as you understood them?

Counsel for plaintiff objects to the question as incompetent, irrelevant, and immaterial. Objection sustained; to which ruling of the court counsel for defendant excepts.

72 Q. Did you write out in German the contents of that paper and did Mr. Muelschuster translate it for you?
A. No, sir; I did not.
Q. Did you not testify that you did write it out yourself and that Mr. Muelschuster translated it?
A. No; I never said that.
Q. Wasn't this question put to you and didn't you answer as follows: "Q. How did it happen to be made out, anyway—that is, the paper? A. I had written that up at home in German and had my wife call to at Muelschuster's office to have it written out and interpreted in English. Q. Then you had already written up the statement in German for Muelschuster to translate for you to sign? A. Yes, sir."
A. No.

Mr. FENLON: Does he understand that he was asked the question if he didn't so testify before?
INTERPRETER: Yes, sir; he says he made that statement.
The COURT: What statement?
INTERPRETER: The statement about that letter.
The COURT: That is too indefinite. Let me have that statement. This witness testifies under many disadvantages. Ask him if he wrote that statement out in German.

By the COURT: Who did write out that statement in German?
A. His wife, with the assistance of this man Klein.
Q. By whose direction was it written *it?* Who ordered it?
A. Nobody. I was very deathly sick at that time, and my wife wanted to have some paper to show how I got injured. That is the way that came up.
Q. Did you tell her what to write?
A. No. I hadn't my senses at that time.

By Mr. FENLON:

Q. Then who did dictate it?
A. My wife did the writing.
73 Q. Who dictated the contents of this German writing?

Mr. BEEBE: I think my question hasn't been asked or answered yet.

The COURT: I know it has not.

Mr. FENLON: You are right.

Mr. BEEBE: I was referring to my brother Fenlon's interruption, not to the court's action at all.

The COURT: I do not attach much importance to the point you are trying to make. It is perfectly obvious that the witness never did say this. I will leave it to the jury, however.

Mr. BEEBE: We except to the remark of the court.

The COURT: He is a German and it comes through an interpreter. You ask him if he testified to that before.

Mr. BEEBE: I shall be obliged specifically this time to except to the remarks of your honor upon the interpretation to be given to that witness in regard to what the witness meant.

The COURT: I leave it to the jury, but I have a perfect right to tell them what my views are, if I have occasion to say so. Ask him if he ever stated that.

The INTERPRETER: He says he can't recollect.

Mr. FENLON: Did he write this or authorize it to be written?

The COURT: The slightest deviation in the language might make it read, "I had written that up at home or I had it written up at home in German."

Q. (To interpreter). Read that part, "I had written it up." Ask him this: Did you say in your testimony on the former trial of this case, "I had written that up at home in German"—that is, did the witness write it up.

A. (By the interpreter). He says no; he can't recollect it.

Q. Did you in fact write that paper?

A. No, sir.

Q. Who did?

A. My wife had written it.

74 The COURT: I think it is the privilege of the court at any time to interpose when a witness is obviously not able to understand perfectly the language used in his presence.

Mr. BEEBE: But I submit, your honor, the whole case depends on his testimony.

The COURT: The difficulty is the inherent inability to understand the question.

Mr. BEEBE: That is our misfortune as well as his. I do not wish to take the least advantage of the witness.

By Mr. BEEBE:

Q. Was this writing on the former trial read to you—translated to you—and did you say that it was correct in substance with the exception of the last sentence?

Counsel for plaintiff objects to the matter as having been asked before. Objection overruled.

A. Yes, sir; I answered that it was all right with the exception of the last part—the last sentence—the last paragraph.

Q. Is the last sentence as follows: "Had the pit been in good order and we would have had a proper place to perform our duty, the result would not have been as it now is." I want to fix what the last clause is. Is that the last clause you refer to when you say that it is not correct?

A. Yes, sir; that is the clause; that last part is not correct.

Q. Were you ever in a round-house not connected with a railroad—that is, work where locomotives are made?

A. Yes, sir; I was in Switzerland seven years.

Q. Were you ever in this country?

A. No, sir.

75 Q. Were you ever in any large factory or iron works where they have a pit under their heavy machinery for the purpose of cleaning them?

A. Yes, sir.

Q. What are pits put under heavy machinery for? What is the purpose of having pits under heavy machinery in factories and other works not connected with railroads?

Counsel for plaintiff objects to the question as not legitimate cross-examination.

Mr. BEEBE: I haven't asked the witness any scientific question.

The COURT: What is your object, Mr. Beebe?

Mr. BEEBE: Our object is to show that pits are used in other factories and places for the purpose of cleaning machinery and replacing iron, etc.

The COURT: You can show that when you come to your part of the case.

Mr. BEEBE: I am asking him now what the purpose is.

Mr. FENLON: It isn't any scientific question that has been raised in the case.

The COURT: It isn't scientific, but if you insist upon the mere technical objection that it is not cross-examination the objection is good.

Mr. FENLON: I do insist upon it, then.

Counsel for defendant objects to the ruling of the court.

Q. These pits under the locomotives are made for the purpose of cleaning and removing parts of the machinery and replacing the same, are they not?

A. Yes, sir.

Q. How deep was this particular pit?

A. About four feet.

By Mr. FENLON:

Q. This pit in controversy?

A. Yes, sir.

76 By Mr. BEEBE:

Q. How high could you stand up in it while you were at work?

A. Five or five and a half feet—at that work.

Q. And the way you were lifting the iron, which you say, I believe, weighed about a hundred and fifty pounds, was on your shoulders, raising it into position when it slipped in some way out of the control of your helper?

A. Just as I have shown it to the jury.

Q. What caused the iron to slip? You don't know, do you?

A. No, sir.

Q. Did you ever lift any timbers up into position in any other business than railroading?

A. At the boiler-making trade there is continuously hard lifting necessary.

Q. You had for many years been accustomed to very hard lifting, had you?

A. Yes, sir.

Q. Was this pit that you were working in very difficult to work in?

A. Just like the others were.

Q. It was no more difficult to work in this pit than in any other pit?

A. No, sir.

Q. Was there any way that you know of in which you could have been injured in that pit except by some iron falling on you—that is to say, having the iron slip out of the hands of your helper? Was there any other risk there besides that?

A. No, sir.

Q. There was no other danger that you know of connected with the moving the ash pan and doing the work that you did except the risk of an iron slipping out of one hand or the other upon either one or the other party at work in the pit?

A. No, sir.

77 Q. When did you ever go out of the round-house to repair an engine—outside of the round-house—and where did you go?

A. I cannot remember that. I can't say as to that—not very often.

Q. Do you remember—are you sure you ever did go outside of the round-house for the Union Pacific Railway Company to repair an engine before you were hurt?

A. Yes, sir.

Q. When was it, and under what circumstances?

A. I think it was in 1882. I repaired an engine outside of the round-house that had a leak. I can't say exactly the time, but I have worked outside.

Q. Where was that engine that you repaired that was leaking?

A. Alongside of the round-house on the next track.

Q. It had been placed there for repairs, had it?

A. That engine was placed there to take in sand, and while they were taking in sand I repaired it.

Q. What did you do?

A. Alongside of the fire-box there was some steam escaping and I repaired it there.

Q. Is that the only occasion you can remember?

A. I think there was a few other times that I worked on an engine on the outside.

Q. Have you any recollection when that was?

A. No, sir; I can't recollect that.

Q. Were you employed for that outside work when you were taken into the round-house?

A. No; it happens frequently that we are called upon to go outside.

Q. But in your case you only remember that one time distinctly, and a few others that you don't remember distinctly?

A. Yes, sir.

(Adjourned until tomorrow morning at 10 o'clock.)

78 SATURDAY, *Sept.* 13, 1890.

Cross-examination resumed by Mr. BEEBE:

Q. Were you a resident of Kansas City at the time this accident happened?

A. Yes, sir.

Q. Have you remained a citizen of that State since?

A. Yes, sir.

Mr. FENLON: I object to that question. I don't know what purpose counsel has in view; it is only my purpose to see that nothing improper goes to this jury. What possible question can there be that he is a resident of Kansas or not? Is it to prejudice him before the jury?

Objection overruled.

Mr. BEEBE: My purpose in showing this——

The COURT: The court does not require you to show your purpose. There is no impropriety in asking a witness where he lives.

Q. How long had you resided in the city before that happened?

A. About three years.

Q. How much did you say that iron weighed that you had on your shoulders?

A. About a hundred and fifty pounds.

Q. Now, in the position that you and Klein were, was it difficult to lift that iron into place?

A. Yes, sir.

Q. Could you and Klein have lifted an iron in that position of a much greater weight?

A. Oh, yes.

Q. Do you recollect whether you testified on this same point on a former trial?

A. Yes, sir.

Q. Didn't you say in substance on the former trial that in the

Redirect examination.

By Mr. WELLS:

Q. Where did this man Klein die, and state as near as you can when he died?

A. He died in a hospital; in a railroad hospital; I don't know exactly where, but he died in a hospital in 1887 after the performance of an operation.

82 Q. What hospital?

A. Union Pacific hospital, but I can't say where.

Q. Do you know what time of the year he died in 1887?

A. I cannot positively state, but I think it was during the summer—during the summer.

Q. Did the Union Pacific railroad take you to a hospital and have you treated for your injuries after you were hurt in 1883?

Counsel for defendant object to the question as immaterial.

Objection sustained; to which ruling of the court counsel for plaintiff except.

Q. Has the Union Pacific Railroad Company paid you anything for the injuries you sustained in 1883?

Counsel for defendant object to the question as immaterial.

Objection sustained and exception taken by plaintiff.

Q. Who instructed Klein to assist you in the work you were performing when you were injured?

A. I was instructed by the boiler boss.

Q. I want to understand from you whether or not you repaired engines outside of the round-house, or whether you always repaired in the round-house.

A. Generally inside of the round-house; once in awhile outside; very seldom.

Q. When Klein went out of the pit after dropping the piece of iron, did he go out at the front of the engine or did he go out at the rear of the engine?

A. He went out in front by the cow-catcher.

Q. At the time the piece of iron fell was your face towards the cow-catcher or was it towards the rear end of the engine?

A. My face was towards the cow-catcher.

Q. In your examination on the trial of this case before you testified that Klein struck his head against the engine and dropped the iron and ran out. State now how you got that information that he struck his head.

83

Mr. BEEBE: I object to that formally on the ground that it assumes that he received this knowledge by way of information, whereas the witness's statement on the first trial was without qualification and as a fact.

Objection overruled; to which ruling of the court counsel for defendant excepts.

INTERPRETER: His answer is that he made this assertion because it was the truth.

Mr. WELLS: He didn't catch my question, I don't think.

Mr. BEEBE: Is that proper, to tell the jury that he didn't catch the question because the answer didn't suit him?

The COURT: How does he know that it isn't true?

Q. Yes; how does he know that it was true?

A. (by the interpreter). Because he can recollect it; that it was so.

By the COURT: Did you see his head strike anything?

A. No; I couldn't see. His back was towards me.

By Mr. WELLS:

Q. When did you first know that his head struck something?

A. He told me the next day about it; Klein told me the next day.

Q. What was your physical condition at the time of the writing of this letter dated Sept. 25, 1884, and addressed "to whom it may concern" and signed by your signature (referring to Exhibit A)?

Counsel for defendant objects to the question as having been gone over in chief.

Objection overruled; to which ruling of the court counsel for defendant excepts.

A. I was very sick in bed at the time that was written, under the influence of opiates, and they expected me to die.

84 Q. Did you or not dictate any portion of this letter; and, if you did, what portion did you dictate?

A. No; I didn't dictate any of it.

Q. Was this letter ever replied to by the Union Pacific Railroad Company or any of its officers?

A. No; not by letter, but verbally.

Q. What was the response to this letter by the railroad company?

Counsel for defendant object to the question as incompetent, irrelevant, and immaterial.

The COURT: At present the objection is well taken until they show that the response was made by some officer of the company having authority to speak for it.

Mr. BEEBE: In the first place, the witness says it is not his letter.

The COURT: You say it is?

Mr. BEEBE: I say it is, and I say it is true, and he says it is all true but the last clause.

The COURT: Find out who it was, if there was any authorized agent made a response to that, and if it turns out that the response was material you have a right to it.

Q. What officer of the company responded to it, either verbally or in writing?

A. Mr. Brinkerhoff.

Q. What position did he hold?

Q. He is superintendent over that division at the State line.
Q. What response verbally did he make to this?

Mr. BEEBE: Do I understand that they propose to show that Mr. Brinkerhoff made some remark to this witness or to somebody else? I should like to have that appear in the question.

The COURT: I understand the interrogatory to call for what Brinkerhoff said to the witness.

Mr. WELLS: That is what I want to know.

85 Q. (Question read.)

The COURT: Make it read, "What response verbally did he make to you?"

Counsel for the defendant object to the question as incompetent, irrelevant, and immaterial.

Objection overruled; to which ruling of the court counsel for the defendant excepts.

A. No to me direct. I couldn't speak to him; my son was with me at the time.

The COURT: Obviously he doesn't know.

Mr. WELLS: Yes; that is the truth of it; he doesn't know.

Q. When was the first time you saw this letter after you signed it and delivered it to Mr. Muelschuster?

INTERPRETER: Please read that question again.

Q. (Read by the reporter.)

A. (by the interpreter). He saw that that letter was interpreted by me and was written on this paper, and I never saw it afterwards and he signed it himself. He signed the letter himself direct.

The COURT: That is no answer to the question.

Q. You didn't catch my question. I want the witness to get it. This letter was sent away from him after it was written. Now, I want to know when was the next time he saw it.

A. The letter was never returned to me; I never saw it any more after that.

Q. Wasn't the next time you saw this letter at the first trial of this case in court, and wasn't it presented to you by counsel for defendant?

A. Yes, sir.

Q. (Handing witness letter.) Examine the letter and state to the jury whether or not you can read it and whether or not you know what its contents are.

A. No; I know what the contents are, but I cannot read it.

86 The COURT: How does he know the contents of it?

Q. Yes; how do you know the contents of it?
A. Mr. Muelschuster interpreted it to me previously.
Q. Is there any other way that he knows what is in it?
A. No, sir.

Q. Do you know whose handwriting this is outside of the signature?

A. I don't know positively, but I know that Mr. Muelschuster wrote it.

Q. How do you know that he wrote it?

A. My wife told me.

Q. Do you know of your own knowledge who wrote this document?

A. No, sir.

Q. Did you know at the time you put your signature to this what there was in it?

A. No, sir. My wife told me that it was a letter claiming some assistance from the railroad company when I signed it.

Q. What was the object of your signing it?

A. That was my intention. I signed it for the simple reason of getting some assistance from the railroad company. That was my expectation.

Q. Who dictated the contents of this letter?

A. I cannot say. Mr. Klein was frequently at my house by my wife, and I couldn't say exactly myself who did dictate it.

Q. The first four lines of this reads as follows: "In the spring of 1883 I, the undersigned, received orders to fix the mud ring and stay bolt in engine No. 5, and to accomplish the same I was compelled to remove the ash pan." Do you understand what I read?

A. (by the interpreter). He says he does partially.

The COURT: What you want to know is whether or not he can understand the English language.

87 Mr. FENLON: We want to show that he doesn't know what is in that letter and never did know.

Q. Do you understand the English language and can you read and write it?

A. No, sir.

Mr. WELLS: As this is all in English, it isn't worth while to ask him anything more.

Q. Where was this letter presented to you and where did you sign it?

A. At my house, when I had first got up out of bed.

Q. Who was present at the time this letter was presented to you and you signed it?

A. My wife handed the letter to me.

Q. Was there anybody else present at the time that was done?

A. I don't recollect very well. I think not.

Q. Did you request any one to prepare this letter prior to that time?

A. No, sir.

Q. Who was present at the time the German letter was read to you from which this translation was made?

A. I never saw the German letter; it was never shown to me.

Q. Was it ever read to you?

A. No, sir.

Q. Who was present when Klein dictated in German what had occurred with regard to this injury?

Counsel for defendant objects to the question on the ground that it assumes that Klein dictated it, whereas the witness has stated that he didn't know that to be a fact.

Objection overruled; to which ruling of the court defendant excepts.

A. I don't know.

Mr. WELLS: We have the testimony of Mr. Wyler on the first trial. I haven't had an opportunity, if the court please, to read it, and it may be—this being offered in evidence—that I will want to examine the witness somewhat in regard to it.

The COURT: The court doesn't understand that it has been offered in evidence, excepting certain marked portions, which were conceded to be the plaintiff's evidence on the other trial.

88 Mr. WELLS: We expressly stated to counsel that he might put the whole of it in evidence, and with that understanding he stopped examining the witness; and I understood Mr. Beebe that both of these transcripts were to go in evidence.

The COURT: Am I right in the supposition that the defendant has not put in evidence the testimony of the witness on the former trials except the portion to which he particularly called attention?

Mr. BEEBE: Yes, sir.

Mr. FENLON: I didn't understand it that way.

The COURT: That was the undetstanding of the court, so it isn't in evidence. Now, you can put it in, if you want to, or any other portion that you desire.

Mr. BEEBE: I might state right here, to save any question at all, that I am perfectly willing that the whole shall go in, and counsel may use such parts as they choose.

The COURT: There is nothing in at present except the passages to which Brother Beebe particularly called attention.

Mr. FENLON: Let it all be considered as in.

The COURT: Very well, then; it is all in now by agreement.

Mr. FENLON: This being all in, we have not had an opportunity to look it over, and we ask the privilege to recall the witness, if we so desire.

Recross-examination.

By Mr. BEEBE:

Q. How frequently was Klein at your house to see you after this accident?

A. I couldn't tell exactly, but he visited me frequently.

Q. For how long a time after the accident was Klein a frequent visitor at your house?

A. The last visit that he paid me was in 1885, after the accident.

89 Q. Well, between the time of the accident and the last visit he made you, was he a frequent and friendly visitor at your house?

A. After I had got better again he didn't visit me at all any more until 1885.

Q. So that we may understand you, state how many times on an average Klein came to see you after the accident and before he left in 1885.

Counsel for plaintiff objects to the question as being too indefinite.

Q. I want to know about how frequent his visits were.

A. After I got up out of bed I saw him twice in my house.

Q. How frequent while you were in bed?

A. I couldn't say exactly; he was there a few times, but I was most of the time out of my senses and I couldn't tell.

Q. This paper here was translated to you by the interpreter, was it not, and you stated that it was all correct and true except the last clause; isn't that a fact?

Counsel for plaintiff objects to the question as having been gone over before. Objection overruled; to which ruling of the court plaintiff, by his counsel, at the time duly excepted and still excepts.

A. Yes, sir.

Witness excused.

90 E. JESSERICH, called on the part of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. WELLS:

Q. Where do you reside, Doctor?

A. Kansas City.

Q. How long have you resided in Kansas City?

A. Ten years.

Q. What is your business?

A. I am a practicing physician.

Q. How long have you been a practicing physician?

A. Since 1860.

Q. Are you a graduate of any medical college?

A. Yes, sir.

Q. What college?

A. At Berlin, Prussia.

Q. Have you been in continual practice since that time?

A. Yes, sir; with the exception of about two years.

Q. What two years was that?

A. I believe 1884 and 1885.

Q. Are you acquainted with Otto Wyler, the plaintiff in this case?

A. Yes, sir.

Q. How long have you known him?

A. I couldn't say exactly. I had to refer to my books; he came some time in 1885, I believe, or 1884 some time, to be examined.

Q. Who brought him to your office, if any one?

A. I couldn't tell that. I think he came with his wife, though.

Q. Did you examine him at that time?

A. Yes, sir.

Q. What did you find? How did you find him afflicted, if at all?

A. I diagnosed an aneurism of the abdominal portion of the descending aorta, the large blood vessel in the bodt.

Q. Please explain to the jury what the descending aorta is, so that they may get a general idea what it is.

91 A. I don't like to use any technical expressions. I will make myself as plain as possible.

The COURT: Doctor, it isn't expected that physicians will use technical language in explaining these things to a jury.

A. The aorta is a large blood vessel in the human body springing from the left part of the heart and conveying the blood all through the human body. It starts here (indicating) and goes down. Here (indicating) we call it different; we call it the a-dominal portion of the aorta, because it is in the abdomen. Right there (indicating) is where the rupture occurred, right on what we call, in technical terms, ——, which is the small portion from which three other arteries spring which provide the liver, stomach, and—I can't call the other just now. Right there on that valve we have placed the aneurism, with which Mr. Wyler is afflicted. Now, an aneurism is like this: You may take an elastic tube—very elastic tube—made out of three distinct portions of rubber; an artery is probably just the same way. The inner two parts may give way by fatty degeneration in an artery, and the outer portion, which is very elastic, you know, will bulge out and form a sac, and that is what we term an aneurism. This sac is the aneurism with which Mr. Wyler is suffering, as has been substantiated by some other physicians, Dr. Halley and Lusher and, I believe, a former physician that treated him before, Dr. Curry.

Q. Dr. Halley and Dr. Lusher were appointed by the court to make an examination with you of Mr. Wyler?

A. Yes, sir.

Q. And they agreed with you as to the doagnosis of this case?

A. Yes; we all agreed.

Q. Now, Dr. Jesserich, tell the jury what effect this aneurism has on the physical system of a man.

92 A. An aneurism is naturally a very dangerous thing and may burst at any time by a violent exercise. The outer layer, you know, which leads the blood through, may burst at any time; if it doesn't it may press against some portions of the human body and in this situation probably the spinal nerves, stomach, and other parts, and interfere with his health in general to a great extent; and this seems to be the case with the plaintiff, Mr. Wyler.

Q. It has effected his general health that way, as I understand you?

A. Yes, sir; according to his complaints.

Q. Is there or not much suffering accompanying aneurism of the descending aorta?

A. It depends entirely upon what portion you know that the aneurism may press. I expect, for instance, with a full stomach or anything of that kind he would suffer more.

Q. Because of the increased pressure?

A. Yes, sir.

Q. Now, Doctor, what condition does an aneurism of the aorta bring a man to with reference to his capacity for physical labor?

A. I would advise a man with an aneurism not to do any hard labor, because the least severe strain may burst the outer coating, you know, which would let the blood into his — or would kill him instantly.

Q. Kill him instantly?

A. Yes, sir.

Q. What usually is the cause of aneurisms of the descending aorta?

A. That is a pretty hard question to answer. An aneurism may be caused without any great exertion, but very often it is caused by exertion. An aneurism is generally secondary or a consequence of some exertion—some fall, strain, or something of the kind generally—but we have cases where it is very hard to make a diagnosis of a cause.

Q. When you find an aneurism is your custom then to ascertain whether or not the patient has anything to produce that?

93 A. Oh, yes, certainly; we always go back and seek the cause for it.

Q. Now, then, in the case of Mr. Wyler, did you do that? Did you endeavor to ascertain what had occurred to him to cause this aneurism?

A. Why, yes; he told me at the time that he had received an injury by a fall; he explained the case as short as he could. He had been treated and examined by a physician before. I didn't treat the man at all. He just came to me for an examination to see if I could give him any relief, and I told him honestly I could not—no cure for his case, except nature cures it herself.

Q. Does a man ever recover entirely from an aneurism?

A. There are such cases on record, but they are very scarce and sometimes are doubted by some of our authorities; they may, though, by degenerating—closing up and forming new matter and making a hard place there, and the sac will by degrees come entirely away. There is such cases on record, but that is a question with us whether those are facts or not, because we can only prove them on a dead body.

Q. From your examination of Mr. Wyler at that time and from his statement to you of the sym-toms which he had prior to that time, did you trace the cause of this aneurism?

Counsel for defendant objects to the question as incompetent.
Objection sustained; to which ruling of the court plaintiff excepted.

Q. Well, from your examination of Mr. Wyler, to what conclusion did you come as to what had caused this aneurism?

Counsel for defendant objects to the question as incompetent.
Objection overruled; to which ruling of the court defendant excepted and still excepts.

A. I couldn't help but come to the conclusion from the statement that he gave that it was caused by this accident or fall.

94 Counsel for defendant objects to the answer and moves that it be stricken from the records as incompetent.
Motion sustained; to which ruling of the court plaintiff excepted.

Mr. FENLON: I submit that as an expert witness he forms his conclusions upon the statement made to him by the witness.
The COURT: You may ask him the hypothetical question if such and such a thing is true upon that hypothesis.

Q. Leaving out the statements of Mr. Wyler, then, what conclusion did you come to from an examination of him as to what had caused this aneurism?

Counsel for defendant objects to the question as incompetent.
Objection overruled; to which ruling of the court defendant excepts.

A. Gentlemen of the jury and your honor, these aneurisms can come without any such cause.

The COURT: What you want to show by the doctor is that such an accident, as it is claimed occurred to this witness, might produce this aneurism. You can put an hypothetical case to him and say, Doctor, suppose a great weight were suddenly precipitated upon the defendant——

Mr. FENLON: That is the import of this question.
The COURT: The court holds that it is not. If you have proven to the satisfaction of the jury that such an accident occurred to your client, then state that case, a hypothetical one, to the Doctor, and he may say whether an aneurism might result from such an occurrence.

Q. Were you present yesterday when Mr. Wyler testified in this case as to how he fell and how he was injured?
A. I was here during the time when he made his motion. I left shortly after. The court permitted me to go.
95 Q. You heard his testimony, then, as to how he fell at that time with the weight on him?
A. Yes, sir.
Q. I will ask you to state to the jury if a circumstance of that kind would, in your opinion, produce such an aneurism as you found Mr. Wyler had.

A. It can produce, undoubtedly, such an injury if the statement he made there is correct.

Q. What condition do you find Mr. Wyler in now?

A. I haven't examined him within the last year.

Q. You haven't examined him within the last year?

A. No, sir.

Q. Did you examine him a year ago?

A. I examined him the last time with Dr. Lusher and Halley.

Q. What condition did you find him in then?

A. We found the aneurism there and we found him debilitated generally to a certain extent—not strong.

Cross-examination.

By Mr. BEEBE:

Q. Is an aneurism ever caused by such an accident as you heard related here unless the blood vessels themselves were diseased prior to that time?

A. It is generally conceded that in a certain age in a hard-laboring man——

Q. Will you please answer my question?

The COURT: Let the witness answer it in his own way.

A. I think it is very rare that such an accident should occur except the blood vessels would be slightly affected beforehand.

Counsel for plaintiff moves to strike out the answer. Motion overruled; to which plaintiff excepts.

Q. What diseases of the blood vessels, except, as you say, in very rare cases, would have to exist prior to such a case in order that it should produce a result?

96 *A* WITNESS: Will your honor permit me to give a short explanation in that respect?

The COURT: Yes.

A. It is very seldom we find an aneurism in a young, healthy person—young, healthy, stout person—but generally in advanced years, in a hard-laboring man, where the vessels have to undergo a great deal of exercise, you know, and there is a strain on them, there may a fatty degeneration of the inner portions take place, which weakens them, and then a strain or an external strain, fall, or an external cause will bring on a rupture a great deal quicker than by a young man who has strong and healthy vessels.

We find aneurism of an artery generally in more advanced years, and generally in people that do hard manual labor.

Q. I am supposing the case of a man who, according to his own statement, had always had perfect health; never been sick a day except when he drank some ice water one time; no other sickness that he remembers of. Now, will you suppose such a man, having arrived at forty or forty-five years of age, to get an aneurism from a fall such as described here by the plaintiff, assuming it to be the fact that he had always been healthy?

A. Why, the weakening of the walls of an artery wouldn't produce any ill health, and the man may have a weakness of the walls of the artery without showing it externally in his general health. I couldn't say that a man that has not been might not have weak blood vessels. He may be entirely healthy otherwise.

Q. I am not asking you whether he might or might not, but whether you would expect to find such a condition in a man who had always been well.

A. Yes, sir; I would probably expect him to have such an accident occur.

97 Q. But, as I understand you to say, he would have to have some weakness of the blood vessels existing prior thereto?

A. I would expect it. It wouldn't be positively necessary, you know.

Q. I mean, as you stated before, it would be a rare occurrence?

A. I say it would be a very rare occurrence, that without some weakening of the blood vessels an aneurism would occur.

Q. In other words, the blood vessels would have to be in such a condition as to be incapable of resisting the strain that a man would resist if his blood vessels were all right?

A. Yes, sir.

Q. Now, what diseases cause the fatty degeneration of these blood vessels, as you say, or weakness in them?

A. Well, I don't know whether you would. There is a constant strain to a man who has a good deal of manual labor, and his h-art action is more exercised than another common man.

Q. Is that all?

A. We have got several diseases.

Q. That is what I ask you; what are they?

A. Well, impure blood will very often do it.

Q. Impurity of blood will do it?

A. Yes, sir.

Q. Is that all?

A. Yes, sir.

Q. If a man has impure blood, that may cause it?

A. Yes, sir.

Q. And so weaken his blood vessels that a slight strain may cause it? Is that true?

A. No; well, yes; it may weaken the blood vessels, yes.

Q. Or a man by long-continued labor, you say, may have so weakened his blood vessels that the blood vessel is just ready to get ruptured or to get an aneurism by some additional strain?

A. Yes, sir.

Q. You wouldn't call a man a very healthy man whose blood vessels were in a condition to receive that aneurism? You wouldn't call him a perfect man in that respect, would you?

A. He may, to all external appearances, be healthy.

98 Q. Yes; I understand that, but I mean as a man. You wouldn't call him a healthy man, a man whose blood vessels were in that condition, would you?

A. No; I wouldn't call him a healthy man if I had any chance after death to examine.

Q. I mean if that condition did exist as a matter of fact.

A. No; I wouldn't call him a healthy man.

Q. He is just in a condition where he is liable to injury from an ordinary strain that may happen to him in his business, isn't he?

A. Yes, sir.

Q. What kind of labor can a man perform that has this aneurism? You say he cannot perform hard labor. What kind of labor can he perform?

A. He may do some housework; he will never want to do any hard lifting or any hard work of any description which will cause a st-ain upon his body or muscles.

Q. Any industry that doesn't require hard strains may be followed by the man?

A. Yes, sir; he may do some work where he has no manual labor to perform.

Q. You mean by manual labor such labor as subjects him to strains?

A. Yes, sir.

Q. Hard work?

A. Yes, sir.

Redirect examination.

By Mr. FENLON:

Q. You stated, in answer to counsel for the railroad company, that a man aged forty or forty-five years, along there, who works hard during his life, is subject to these aneurisms more than a man who doesn't labor hard?

A. Yes, sir.

Q. From external or outside forces?

A. Yes, sir.

Q. That is true of the whole human family?

A. Yes, sir.

Q. That wouldn't deprive a man of the ability to carry on the ordinary avocations of life?

A. No, sir.

99 Q. He could practice law or medicine?

A. Yes, sir.

Q. Sit on a jury?

A. Yes, sir.

Q. And attend to the ordinary affairs of life?

A. Yes, sir.

Q. He might be a bank president or the president of a railroad company and capable of cutting off coupons or anything of that kind?

A. Yes, sir.

Q. He could do that as well as anybody else?

A. Yes, sir.

Q. So that your general judgment with reference to the question

about which you have been asked is that a laboring man forty or forty-five years of age is more liable to aneurism from outside pressure?

A. Yes, sir.

Q. That is the machinery of life as you understand it and according to the anatomy and human history and medical sciences?

A. Yes, sir.

By Mr. WELLS: How do Dr. Halley and Dr. Lusher stand as surgeons in this city?

Mr. BEEBE: We are not attacking any physician in this case.

The COURT: Do you admit that the- stand high?

Mr. BEEBE: Certainly; no question about that.

Witness excused.

100 OTTO WYLER recalled on his own behalf.

Examined by Mr. WELLS:

Q. Prior to April 23, 1883, or since that time have you had any fall or injury which hurt you in any way?

A. No, sir.

By Mr. BEEBE:

Q. For how many years prior to this accident had you been in the habit of lifting heavy materials?

A. I have been at the same occupation since 1861.

Q. Does that occupation require you to lift heavy weights?

A. Continually; every day.

By Mr. FENLON:

Q. Previous to the time of this injury, did this occupation, in which you have been engaged since '61, have any effect upon your physical system or ability to work?

A. No, sir.

Witness excused.

101 Mr. FENLON: We are through with our testimony with the exception of one witness, and that is the wife of the plaintiff in this case.

The COURT: Have you any testimony, Brother Beebe?

Mr. BEEBE: I want to introduce some portions of that first transcript, and I suppose they may want to introduce the balance of it, and I might suggest that I read such portions to the jury as I choose.

The COURT: Yes; and they can do the same.

Mr. FENLON: The understanding a few moments ago was that they were all evidence.

The COURT: That was the understanding.

Mr. BEEBE: However, let it be understood that at this point I offer no testimony, as I do not wish to offer any until the- get through with their case.

(Recess until 2 o'clock p. m.)

CAROLINE WYLER, called on the part of the plaintiff, being first duly sworn, testified as follows:

The COURT: Madame, do you understand the English language?
WITNESS: I understand it.
The COURT: You understood that oath, did you?
WITNESS: Yes.

Direct examination.

By Mr. FENLON:

Q. What is your name?
A. Caroline Wyler.
Q. Are you the wife of the plaintiff in this suit? Are you the wife of the man who is bringing this suit?
A. Yes, sir.
Q. Were you his wife in April, 1883, at the time he claims to have been injured?
A. Yes, sir.
Q. Were you his wife on the 25th day of September, 1885, two years after he was hurt?
A. Yes, sir.
102 Q. Were you present at the time some writing was made by you or somebody else?
A. I done it.
Q. Now, I want to know if in doing whatever you did do you did it by your husband's direction at the time or before that time. No; I will withdraw that question. You say you made this statement?

Counsel for defendant objects.

Mr. FENLON: I beg your pardon; it is difficult for me to frame the question so she will understand it and not lead the witness.

Q. How did you come to make that paper?

Counsel for defendant objects to the question as leading.

By the COURT: Was that paper made by your direction or your husband'- direction?
Mr. FENLON: I will adopt your honor's language; was the paper written by you (to the witness)?
The COURT: No, no; "made"—by whose direction was that paper gotten up.

Q. By whose direction was that writing made?

Counsel for defendant objects to the question as incompetent.

Mr. FENLON: I am inclined to think that it is.
The COURT: This is not to go to the jury as evidence. I will tell them so now.
Mr. FENLON: I want to ascertain from her as to her agency.
Mr. BEEBE: We make the same objection to her establishing her agency that way.

The COURT: The objection is overruled.

By the COURT: By whose direction was this paper gotten up?
A. I made it by myself. I never had any direction at all.

The COURT: That settles the question. Gentlemen of the
103 jury, all that this lady has said was said for the information of the court and not for you, for the purpose of determining whether she was a competent witness in the case; the fact is disclosed that she is not a competent witness, and anything you may have heard her say is not to be considered by you as evidence.

Counsel for defendant excepts to the overruling of his objection to the question propounded to this witness.
And the plaintiff here rested his case.

Plaintiff having rested his case, counsel for defendant moved the court to direct the jury to render a verdict for defendant, upon the ground that the plaintiff's testimony had not made out a case, which motion the court denied; to which ruling of the court the defendant at the time excepted.

Mr. BEEBE: Will your honor allow me to dictate a demurrer under our practice here?
Mr. FENLON: Can't you reduce your demurrer to writing?
The COURT: It isn't necessary to reduce it to writing.
Mr. BEEBE: Counsel for defendant requested the court to charge that under the evidence and the pleadings the verdict should be for the defendant on the plaintiff's own testimony; which demurrer was by the court overruled, and to which ruling of the court defendant at the time duly excepted and still excepts.

104 *Defense.*

Whereupon the defendant, to sustain the issues upon its behalf, then offered evidence as follows, to wit:
Counsel for defendant offered in evidence the original petition and the date of its filing, to wit, 25th day of Sept., 1885.
Counsel for defendant also offered in evidence the amended petition and the date of its filing, to wit, the 2nd day of Nov., 1888.

Mr. BEEBE: If the court please, we will offer in evidence this letter, dated Sept. 25, 1884, and marked "Ex. A."
The COURT: Consider it in evidence.
Mr. FENLON: During the plaintiff's case, over my objection, your honor admitted that paper in evidence, and it so appears in the record, and it was then read in evidence to the jury. Now, what is the use of offering it again?
The COURT: Counsel for defendant has a right to have it in evidence. Consider it in evidence now.

Counsel for defendant here reads the same to the jury, in the words and figures following, to wit:

"ARMOURDALE, KAS., *Sept.* 25, 1884.

To whom it may concern:

In the spring of 1883 the undersigned received order to fix the mundring and stay bolt in engine No. 5, and to accomplish the same I was compel-ed to remove the ash pan and grates of said engine. All this work had to be done in the pit*t*. The culvert to drain the water from said pit*t* had rotted and caved, and consequently the water would remain in the pit*t*, in that condition water standing eight inches in de*b*th. I was compel-ed to use blocks and boards so that I could pos-ibly work, but by placing said blocks and boards in pit*t* the place to work became so inconveni*a*nt that the work had to be done in a st*u*ping and bending position, and just as we w*h*ere in the act of placing the front grates, the heaviest of all, my helpe*d*, in consequence of the small working space, come in contact with the mundring, thereby causing him to drop his hold on said grates, and the whole weight of said grates being concentrated on myself, in as aforesaid st*u*ping position, and there and at that time caused an internal injury which will for lifetime disable me to follow my usual avocation.

Had the pit*t* been in good order, and we would have had the proper space to perform our duty, the result would have not been as it now is.

Respectfully, OTTO WYLER,
Boiler-maker."

Mr. BEEBE: I will read such portions of the transcript of the evidence of the former trial as I see fit, and then counsel for plaintiff may use such portions as they desire.

GENTLEMEN OF THE JURY: I will read to you portions of the plaintiff's testimony on the first trial of this case as interpreted by the interpreter. I read first from page 2: "Q. State just what happened on the day that you allege you received an injury. A. Well, we had to lower the ash pan and grate. I had to take out the grate and ash pan to repair the leakage in the ash pan, and then replace them again. Q. Well, state what occurred to you when you were returning the grate to its place. A. I was lifting that iron with this man Klein—I mean the grate—and as I got up in this position (witness here illustrating)—the position I have shown—and having the iron, my helper's head struck against something above and dropped the grate and left the whole weight on me in my position. When the other man left the grate it left me in that position (witness here illustrating, bending backward), so the whole weight was on me. Q. In what manner did your helper drop his end of the grate, and what did he say, if anything, at the time? A. He struck his head and dropped it and said something—'God damn son of a bitch,' or something—and left it." I read also from page 5: "Q. (Referring to said paper.) Show the jury just where—what place—you and Klein were at the time he dropped his end of the grate. By Mr. Beebe: That has been gone over before. The witness has been asked and he went over it all before.

A. (Witness illustrating by bending backwards.) That is my position, and Klein's position was back of me, standing with backs to each other. Q. Could you see Klein when he dropped his end of the grate? A. No, sir; we were back to back, and I could not see him." Also part of the cross-examination, on the last page but one: "Q. How did it happen to be made out, anyway? A. I had written that up at home, in German, and had my wife call at Mr. Muehlschuster's office to have it written out and interpreted in English. Q. Then you had already written up a statement in German for Mr. Muehlschuster to translate for you to sign? A. Yes, sir."

And the defendant here rested its case.

And the foregoing was all the testimony offered and introduced in evidence on the trial of the above cause at the September term, 1890, of the circuit court of the United States in and for the western division of the western district of Missouri.

Whereupon the defendant asks the court to instruct the jury as follows, which instructions were refused by the court, to which ruling of the court defendant at the time excepted and still excepts, to wit:

First. That under the pleadings and the evidence the verdict should be for the defendant.

Second. That under the evidence the present case does not fall within the act of Kansas which is pleaded, and the verdict should be for the defendant.

107 Whereupon the court instructed the jury as follows, to wit:

GENTLEMEN OF THE JURY:

1.

Briefly, the plaintiff claims that he was an employé of the defendant company, and that, while working for the company and in the line of his duty, he received a severe physical injury through the negligent conduct of another employé of the defendant company assigned to him to assist him in his work.

2.

Negligence is the omission to do something which a reasonably prudent man would do under like circumstances or the doing of something which a reasonably prudent person would not do under the particular circumstances.

3.

If you find from the evidence that the plaintiff and his coemployé, while working for the defendant company, were lifting a heavy grate in the discharge of their duty as the employés of the defendant company, and that the plaintiff's helper or coemployé, negligently and improperly and without any sufficient ground or excuse for so doing, suddenly let go his hold on such grate without any

warning to plaintiff, by reason of which the plaintiff was thrown down and injured by the weight of the iron, then that employé was guilty of negligence, and his negligence is the negligence of the defendant company in this case by the law of Kansas, and that entitles plaintiff to recover in this case.

To which paragraph No. 3 defendant duly at the time excepted.

4.

If the plaintiff's coemployé was not guilty of any negligence or there was sufficient reason or justification for his act in letting go the grate at the time and under the circumstances he did, then the defendant company is not liable. It is a question of fact for
108 you to determine, gentlemen, keeping in mind the definition of negligence which I have given to you, whether the conduct of the defendant's employé at the time the plaintiff received the injury complained of was a negligent, careless, or reckless act, or, in a word, whether it was a negligent act—one that a reasonably prudent man standing in his shoes would not under like circumstances have done. If a reasonably prudent man, standing in the shoes of Mr. Klein, would not have done the act that he did and which it is claimed resulted in the injury to this plaintiff, then he was guilty of negligence and the company is liable.

To which paragraph No. 4 the defendant then and there duly excepted.

5.

If a reasonably prudent man, under the conditions surrounding him at the time he let go of that grate would have done what he did, then he is not guilty of negligence and the defendant is not liable.

To which paragraph No. 5 the defendant then and there duly excepted.

6.

If you find that Klein was guilty of negligence, and that the injury, whatever it was, that the plaintiff sustained on that occasion was the result of the conduct of his coemployé, your next inquiry will be, "What damages has the plaintiff sustained by reason of that negligent act?"

I will enumerate to you the items that you should take into consideration in computing the damages in the event you find the defendant is guilty of negligence. First, you will compensate the plaintiff for the pain and suffering he has already suffered and any that the evidence shows he may be compelled to suffer in the future by reason of that injury. Now, gentlemen, no witness has been called to testify before you what value you should put
109 upon pain and physical suffering. No one can be called for that purpose. If a man is sued for a hundred bushels of wheat you can call a witness onto the stand and prove the value of the wheat; that is the way that the jury learns the value of wheat; or you may bring a price-list into court and read from the paper

the value of wheat; but there is no price-list for pain. No witness can be called before a jury to testify as to what they may think the value of pain is or as to what damages should be awarded for an hour or a month or a year or years of pain; that item of damages is left solely to your good sense and judgment, aided by your personal knowledge and experience, to be exercised reasonably, fairly, and honestly and conscientiously under your oaths. You are the sole judges of what damages you shall award for that, having regard to the suffering that has been shown. It must be such suffering as you ascertain from the evidence that the man has undergone and is likely to undergo.

7.

A second item of damages is the expenses to which the plaintiff may have been put by reason of that injury—his surgeon and doctor's bills and drug bill, whatever he has shown them to have been.

To which 7th paragraph the defendant then and there duly excepted.

The third item of damages is his loss of capacity to earn a living by reason of the injury, and when you come to that, if you ever come to that point, you will inquire what his age and physical condition was when he received the injury, and what wages he was then able to earn and was earning. You will then ascertain what his physical condition has been since he received the injury and what wages he has been able to earn down to the present time and what wages he will be able to earn in the future, and in that way you will determine the degree that he has been incapacitated to earn a living by reason of these injuries, and you will allow him such reasonable compensation for loss of capacity to earn a living as the evidence seems to justify.

You are the sole judges of the facts of this case. Some important legal questions have been brought up for consideration of the court and have been decided. You have nothing to do with them. The facts of the case I have submitted to you, and you must determine and arrive at your verdict from the evidence which you have heard. You are the sole judges of that.

You are the sole judges of the credibility of the witnesses and the weight you will give to the evidence of every witness, and in determining what weight you will give to the evidence of any witness you will exercise your good common sense and experience and your observation of the witness on the stand and all the circumstances, and determine whether you will believe or disbelieve him in any given case, or whether you reject his testimony altogether or a portion of it. The whole matter is with you; that is your department over which you have exclusive jurisdiction and which does not pertain to the court.

If you shall find that the defendant is guilty of negligence you will then, as I told you, take the three items of damage into consideration, ascertain what, in your judgment, the aggregate amount of

damages is, and the form of your verdict will be in that event, "We, the jury, find for the plaintiff and assess the damages at —— dollars."

If you find for the defendant the form of your verdict will be, "We, the jury, find for the defendant."

Let me say to you in conclusion, gentlemen, this is a case between the plaintiff, a mechanic—a poor man, probably—and the railroad, and there was an unguarded remark probably dropped by one of the counsel alluding to that fact. Now, I should feel very bad indeed if I supposed there was a man on that jury who would let such considerations influence him in the slightest degree. I want to say to you that when a man comes into a court of justice and takes
111 the oath that you and I have taken we have to be strangers to any such consideration. We cannot have any compassion, we cannot have any sympathy. It is a hard thing to say, but the judge or the jury who would find a verdict from compassion or sympathy for one party or through prejudice toward the other party would be utterly unfit for their places or position. It would be no court of justice at all. There would be no law or justice in a tribunal where verdicts or judgments were based upon such considerations.

9th.

One more word. It has been stated by counsel in your hearing and presence that there have been two previous trials of this case in which the juries disagreed. Gentlemen, I want to say to you that you are not expected to follow their example. This court does not have any mistrials. You need not expect to get off which I stay in this court by leaving the case where the other juries have left it.

To which paragraph No. 9 the def't then and there duly excepted.

Counsel for defendant excepts to each and every paragraph of the foregoing charge to the jury by the court, and also excepts to the remarks of the court in regard to the fact that there has been a disagreement of the jury before and that the court would insist upon this jury bringing in a verdict.

The jury, on the 13th day of September, 1890, returned upon said evidence and charge a verdict for the plaintiff and against the defendant in the sum of ten thousand dollars, and the defendant, within four days after verdict, filed the following motions for a new trial and in arrest of judgment, to wit:

112 In the Circuit Court of the United States for the Western Division of the Western District of Missouri, September Term, A. D. 1890.

OTTO WYLER, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Motion for a New Trial.

Now comes the defendant within four days after verdict and moves the court to set aside the verdict and grant a new trial in the above-entitled cause upon the following grounds, namely:

1st. Because the court erred in permitting plaintiff to amend his petition changing the cause of action.

2nd. Because the court erred in sustaining plaintiff's demurrer to defendant's amended answer.

3d. Because the verdict was against the law.

4th. Because the verdict is against the evidence.

5th. Because upon the evidence the verdict should have been for the defendant.

6th. Because the court has no jurisdiction of plaintiff's alleged cause of action.

7th. Because the court admitted several times upon the trial improper and illegal evidence over and against the objection of defendant.

8th. Because the court excluded proper and legal evidence in behalf of defendant.

9th. Because the court during the trial improperly and against the objection of defendant commented upon the plaintiff's testimony to the prejudice of defendant with the jury.

10th. Because the court erred in refusing defendant's request at the close of the plaintiff's case that the jury should be instructed that under the pleadings and the evidence their verdict should be for the defendant.

113 11th. Because the court erred in refusing to give Nos. one and two of defendant's requested instructions.

12th. Because*d* the court erred in its charge to the jury and committed error in each and every part thereof.

13th. Because the court erred in his remarks to the jury, at the close of his charge, when urging the jury to agree on a verdict.

14th. Because the damages are excessive.

THE UNION PACIFIC RAILWAY COMPANY,
By its attorney, JOHN W. BEEBE.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

OTTO WYLER, Plaintiff,
vs.
UNION PACIFIC RAILWAY COMPANY, Defendant.

Motion in Arrest of Judgment.

Now comes the defendant and moves the court to arrest the judgment in the above-entitled cause—

First. Because the petition does not state facts constituting a cause of action.

Second. Because on the record the court has no jurisdiction of the subject-matter of the action.

J. W. BEEBE,
Attorney for Defendant.

114 Which said motions for a new trial and in arrest of judgment were on the 20th day of September, 1890, submitted to the court, and were by the court overruled on January 5th, 1891; to which action of the court in overruling said motions and each of them the said defendant then and there excepted.

And forasmuch as the proceedings at said trial and the rulings and action of the court therein as above set forth and the said exceptions of said defendant thereto do not appear of record in this cause the said defendant prays the court that this its bill of exceptions may be allowed and signed and sealed and made a part of the record in this cause, which is accordingly done this 5th day of January, 1891, at said September term of said court.

HENRY C. CALDWELL,
U. S. Circuit Judge, 8th Circuit.

NOTE.—This bill contains much surplus and irrelevant matter and violates the rule of the Supreme Court in that regard, but it was presented for signature at the moment of my leaving court and when there was no time to reform it.

HENRY C. CALDWELL, *Judge.*

115 Said bond for appeal is in words and figures as follows:

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents that we, the Union Pacific Railway Company, are held and firmly bound unto Otto Wyler, his executors and administrators, in the sum of twenty thousand dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifth day of January, A. D. 1891.

Upon this express condition, to wit: Whereas the above-named The Union Pacific Railway Company has prosecuted a writ of error

to the Supreme Court of the United States to reverse the judgment rendered in the cause above named by the circuit court of the United States for the western division of the western district of Missouri: Now, if the above-named The Union Pacific Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

THE UNION PACIFIC R'Y CO., [SEAL.]
By W. H. HOLCOMB, [SEAL.]
Ass't Gen'l M'g'r. [SEAL.]
W. H. HOLCOMB. [SEAL.]
THOS. L. KIMBALL. [SEAL.]
J. O. BRINKERHOFF. [SEAL.]
WITTEN McDONALD. [SEAL.]

Signed and sealed in presence of—
W. J. CARROLL.
L. S. WILSON.
R. R. JONES.

The above bond is hereby approved and ordered to be filed and made a part of the record & to operate as a supersedeas.

HENRY C. CALDWELL,
Circuit Judge.

(In pencil:)

The surety, Witten McDonald, makes the bond good.

JNO. F. PHILIPS,
U. S. Dist. Judge.

116 UNITED STATES OF AMERICA, } ss:
State of Nebraska, }

W. H. Holcomb, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein and is worth, over and above all his debts and liabilities, the sum of ten thousand dollars; that he owns stocks and real estate to the amount subject to execution in the State of Nebraska.

W. H. HOLCOMB.

Subscribed and sworn to before me this 5th day of January, A. D. 1891.

W. J. CARROLL,
Notary Public.

UNITED STATES OF AMERICA, } ss:
State of Nebraska, }

Thos. L. Kimball, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein and is worth, over and above all his debts and liabilities, the sum of ten thousand dollars, and that he owns real estate to that amount subject to execution in the State of Nebraska.

THOS. L. KIMBALL.

Subscribed and sworn to before me this fifth day of January, A. D. 1891.

W. J. CARROLL,
Notary Public.

UNITED STATES OF AMERICA, }
Western District of Missouri, } *ss:*

Jacob O. Brinkerhoff, obligor in the within bond, being duly sworn, upon his oath deposes and says that he resides as stated therein and is worth, over and above all his debts a*b*d liabili-
117 ties, the sum of ten thousand dollars, and that he owns real estate to that amount subject to execution in the State of Missouri.

J. O. BRINKERHOFF.

Subscribed and sworn to before me this 8th day of January, A. D. 1891.

ALBERT BUSHNELL,
[SEAL.] *Notary Public for Jackson Co., Mo.*

Term expires July 19th, 1893.

STATE OF MISSOURI, }
County of Jackson, } *ss:*

Witten McDonald, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein and is worth, over and above all *g*is debts and liabilities, the sum of twenty thousand dollars, and that he owns real estate & personal property to that amount subject to execution in the State of Missouri.

WITTEN McDONALD.

Subscribed and sworn to before me this 13th day of Jan'y, A. D. 1891.

[SEAL.] CHARLES E. PRATT,
Notary Public.

118 The following opinion was filed on the 5th day of January, A. D. 1891, to wit:

OTTO WYLER
vs.
THE UNION PACIFIC RAILWAY COMPANY.

CALDWELL, *J.:*

The grounds chiefly relied on for a new trial are that the plaintiff's action was barred and the cause of action itself extinguished. The contention is that the action cannot be maintained in the State of Missouri, because the right of action was given by a statute of Kansas, and that the cause of action thus given by the statutes of that State was barred by the statute of limitations of that State before the action was brought in this State.

Upon looking into the record I find these questions were raised by demurrer and decided by Circuit Judge, now Justice, Brewer and Judge Philips. This case has been tried three times; once before Judge Brewer, once before Judge Philips, and lastly before myself. In the first two trials the juries failed to agree. On each of the former trials the presiding judge must necessarily have ruled upon the question of law raised by this motion and must have ruled adversely to the defendant; otherwise there would have been a verdict for the defendant. The record also shows that these questions were raised by demurrer to the plaintiff's petition and decided adversely to the defendant.

In view of all these rulings I am inclined to regard these questions as *res adjudicata* in this case. I think, for the purposes of this case, at least, I ought to accept the ruling of Judge, now Justice, Brewer and Judge Philips on the demurrer and on the two previous trials of this case as settling the law for this case.

See Silver Mining Co. *vs.* Va. Water Co., 1 Sawyer, 685.

119 Appleton *vs.* Smith, 1st Dillon, 202.

Oglesbie *vs.* Attrill, 14 Fed. Rep., 214.

If a new trial should be granted it would set at large these questions to be again ruled upon by the judge who might preside at the next trial. Nothing would be settled. There ought to be an end to litigation, and the best way, if not the only way, to put an end to this suit is to let these questions go to the court of final resort for an authoritative decision.

120 UNITED STATES OF AMERICA, *set:*

I, Warren Watson, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true transcript of the record and proceedings in the cause therein named as fully as the same appear in my office.

Witness my hand as clerk and the seal of said court. Done at office, in the city of Kansas, Missouri, this 31st day of March, A. D. 1891.

{ Seal of the United States Circuit Court, Western Division for the Western District of Missouri. }

WARREN WATSON, *Clerk*,
By —— ——, *D. C.*

Endorsed on cover: Case No. 14,728. W. Missouri C. C. U. S. No. 217. The Union Pacific Railway Company, plaintiff in error, *vs.* Otto Wyler. Filed July 9th, 1891.

158-2

FILED,
JAN 28 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894. No. 217.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

OTTO WYLER.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Brief on Behalf of Plaintiff in Error.

By JOHN W. BEEBE,
JOHN F. DILLON,
HARRY HUBBARD,
SAMUEL SHELLABARGER,
JEREMIAH M. WILSON.
A. A. HOEHLING, JR.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

OTTO WYLER.

No. 217.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Statement of Case.

The present action was one brought in the Circuit Court of Jackson County, Missouri, October Term, 1885. (*R., p. 6.*) The petition was filed September 25, 1885. (*R., p. 8.*) Thereafter the cause was removed to the Circuit Court of the United States for the Western Division of the Western District of Missouri, and Transcript of Record filed October 11, 1886. (*R., p. 6.*)

The *facts* in the case, so far as disclosed by the Record, and upon which recovery is sought to be maintained against the defendant company, are substantially as follows:

The plaintiff came to this country from Switzerland in August, 1880, and went into the employ of defendant in September, 1880, at its machine shops in Armourdale, Kansas, as a boiler-maker. Subsequently he was em-

ployed in the round-house at Armstrong, Kansas, to repair engines. His work was exclusively in and about the round-house, and he was at no time on the road; his duties were in no way connected with the operation of the road. Sometimes he repaired engines that had steam in the boilers, and oftener "dead locomotives." He could remember only one instance when he was called to repair a locomotive on the track near the round-house that had steam up.

The account which he gave of his injury upon the last trial is as follows:

On the 23d day of April, 1883, while working for defendant in its round-house at Armstrong, he was requested to repair a "dead" engine standing over a pit in the round-house. The under part of the fire-box, the stay-bolt, and the mud-ring were out of repair. He was assisted by one Klein, a co-employé. In order to repair the locomotive they had to get into the pit under the engine and remove the ash-pan, take out the grate, and replace them. The pit was about four feet deep, four feet in width, and extended more than the length of the locomotive, and it was extremely difficult to do the work they had to do. The grate which was removed was 36 inches in length, 15 inches in width, and about an inch and one-half in thickness; its weight was about one hundred and fifty pounds.

While endeavoring to replace this grate in its former position, the plaintiff and Klein were obliged to stand, or, rather, crouch, back to back, in the pit. The grate rested upon their shoulders, and, just as they were about placing the grate in the fire-box, it slipped off Klein's shoulder and injured the plaintiff. When the grate fell plaintiff and Klein were standing back to back. Plaintiff testified that he did not see the iron slip out of Klein's hands or off his shoulder; that he did not know how it happened, nor what caused it to fall.

The plaintiff testified upon a former trial that Klein struck his head on the mud-ring of the engine when the grate fell (as will be seen later when his *written statement* is referred to).

Plaintiff also assigned this as a cause for the falling of the grate. On the last trial, however, he modified the statement by saying that Klein told him the next morning that he hit his head on the mud-ring; that he examined his head and did not find any bumps on it. When the grate fell from Klein's shoulder, he put his hand upon his head, ran out of the pit, at the same time saying, "G— d— s— o— b—."

Plaintiff and Klein had always been on the most friendly terms, and after plaintiff's injury Klein was a frequent visitor at his house. Klein died before the case was tried the first time. Shortly before the plaintiff brought his suit, he sent a statement to the defendant company, which was signed by him and introduced in evidence. The statement was as follows (see plaintiff's testimony, *R., pp. 28–59*):

"ARMOURDALE, KAN., *Sept. 25, 1884.*

"*To whom it may concern:*

"In the spring of 1883, the undersigned received order to fix the mud-ring and stay-bolt in engine No. 5, and to accomplish the same I was compelled to remove the ash-pan and grates of said engine. All this work had to be done in the pit. The culvert to drain the water from said pit had rotted and caved, and consequently the water would remain in the pit in that condition—water standing eight inches in depth. I was compelled to use blocks and boards so that I could possibly work, but by placing said blocks and boards in pit, the place to work in became so inconvenient that the work had to be done in a stooping and bending position; and just as we were in the act of placing the front grates, the heaviest of all, my helper, in consequence of the small working space, came in contact with the mud-ring, thereby causing him to drop his hold on said grates, and the whole weight of said grates

being concentrated on myself, in as aforesaid stooping position, and there, and at that time, caused an internal injury, which will for lifetime disable me to follow my usual avocation. Had the pit been in good order, and we would have had the proper space to perform our duty, the result would have not been as it now is.

"Respectfully,

"OTTO WYLER,
"*Boiler-Maker.*"

(*R., p. 48.*)

There was no other evidence in the case from which the jury could infer that the injury resulted from Klein's negligence. There was no dispute as to the extent of plaintiff's injuries. Physicians appointed by the court examined him and testified that his injury consisted of aneurism of the descending aorta; that it was impossible for him to ever do any hard labor, and that he was in danger of dying suddenly from that cause.

During all the time between the date of the injury, April 23, 1893, and the trial, plaintiff resided in Wyandotte County, Kansas.

So far as the alleged negligence of the co-employé, Klein, was concerned, no other evidence was adduced than that heretofore referred to. Klein died before the first trial, and it was, therefore, impossible for the defendant company to produce him as a witness for the purpose of showing just how it was the accident occurred.

Pleadings.

It is of importance to refer to the *cause of action* stated in the petition filed in the State court.

It is therein alleged, in substance, that in *April, 1883*, plaintiff, while in the employ of defendant at Wyandotte, Kansas, was injured through the negligence of one Klein, a co-employé; that said Klein was an incompetent

person; that while plaintiff and Klein were engaged in repairing a fire-box of a locomotive, "and were in the "act of lifting and placing in position the fire-dump be- "longing thereto (which was a part of their said business "and employment), said dump, being made of iron and "of great weight, and while engaged in such business, "and without fault on the part of the plaintiff, and "through the negligence and mismanagement of defend- "ant in retaining and employing the said Klein, after "knowing his incompetency, the said heavy iron dump "was carelessly and negligently thrown down and let "fall upon and against the plaintiff," by means of which premises he was injured, &c. (*R., pp. 6–7.*)

It will be observed that the *cause of action* there stated grows out of the alleged *negligence of defendant in retaining an incompetent servant*, through whose alleged carelessness plaintiff received his injury.

After the cause had been removed and docketed in the Circuit Court of the United States, on the 2d day of November, 1888 (and more than five years after the date of plaintiff's injury), plaintiff filed an amended petition in which the charge that defendant's negligence consisted in retaining an incompetent servant, &c., was dropped, and a recovery sought upon the allegation that plaintiff was injured through the carelessness of Klein (under the circumstances stated in the original petition), and that, by reason thereof, the plaintiff was entitled to recover by virtue of section 1, chapter 93, Laws of Kansas of 1874, which statute is set out in the petition, and is as follows:

"*Section one.* Every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in this State in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés, to any person sustaining such damage." (See Amended Petition, *R., pp. 18–19.*)

On the 5th day of March, 1889, an amended answer was filed by the defendant to the said amended petition. The second subdivision of the answer was a plea to the jurisdiction; the third a plea of contributory negligence; and the fourth a plea of the statute of limitations, as follows:

"And for a fourth and further defense defendant alleges that at the time of the alleged injury to the plaintiff, plaintiff was, and ever since has been, a citizen of the State of Kansas, and defendant was at said time, and ever since has been, a citizen of the State of Kansas; that at the time of the alleged injury to plaintiff there was, and ever since has been, a public statute of said State of Kansas, known as the statute of limitations; that by the 18th paragraph of said statute, article 3, it is and was provided that civil actions other than for recovery of real property can only be brought within the following periods after the cause of action shall have accrued and not afterwards; that, by the third subdivision of section 18 of the Code of Kansas, it is provided, as follows:

"'*Third, within two years.* An action for trespass upon real property, an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another not arising on contract and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of fraud.'

"Defendant further alleges that more than two years elapsed after the cause of action set forth in plaintiff's petition and amended petition before the suit was brought. Wherefore defendant says that said action was and is barred by virtue of the statute hereinbefore set forth.

"That by paragraph 25 of said article third it is provided that when a right of action is barred by the provisions of any statute, it shall be unavailable either as a *cause of action* or ground of defense.

"5. And for a fifth and further defense defendant avers that more than five years elapsed after the alleged

accruing of plaintiff's cause of action, contained in said amended petition, before the filing of said amended petition. Wherefore defendant avers that the cause of action set forth in said amended petition is barred by the statute of Missouri, and plaintiff ought not to have and maintain the same against defendant. Wherefore defendant prays judgment and for costs." (*R., pp. 21–22.*)

On the same day plaintiff filed a demurrer to the *3d* ground of defense in said answer, which was a general allegation of contributory negligence. (*R., p. 22.*)

The court sustained the demurrer (*R., p. 23*), and plaintiff then filed a reply to the second subdivision of said answer. (*R., p. 23.*)

The case was tried on these pleadings three times, the first two trials resulting in disagreements of the jury. (*R., pp. 23–24.*) The case came on for trial before Judge Caldwell, and resulted in a verdict for plaintiff, September 13, 1893, in the sum of ten thousand dollars (*R., p. 26*), whereupon the present writ of error was sued out. (*R., p. 1.*)

Assignment of Errors.

(1) The court erred in permitting the plaintiff to amend his petition by changing the cause of action therein stated and introducing a new and entirely different cause of action.

(2) The court erred in sustaining plaintiff's demurrer to the third paragraph of defendant's amended answer, which answer was filed March 5, 1889.

(3) The court erred in reference to the written statement of plaintiff's claim, which was introduced in evidence for the purpose of contradicting the plaintiff, and about which plaintiff was being cross-examined, in stating in the presence of the jury: "It is perfectly obvious that

the witness never did say this" (*R., p. 48*), as set forth at length in the third assignment of error in the Record herein. (*R., p. 3.*)

(4) The court erred during the trial in excluding the following testimony (testimony of plaintiff on cross-examination):

"Q. Were you ever in any large factories or iron works where they have a pit under their heavy machinery for the purpose of cleaning them?

"A. Yes, sir.

"Q. What are pits under heavy machinery for? What is the purpose of having pits under heavy machinery in factories and other works not connected with railroads?"—

as set forth at length in the fourth assignment of error in the Record herein. (*R., p. 4.*)

(5) The court erred in refusing, at the close of plaintiff's case, to direct the jury to render a verdict for defendant. (*R., p. 68.*)

(6) The court erred in refusing to charge the jury, at the request of defendant—

(*a*) That under the pleadings and the evidence the verdict should be for the defendant.

(*b*) That under the evidence the present case does not fall within the act of Kansas pleaded, and the verdict should be for the defendant. (*R., p. 70.*)

(7) The court further erred in charging the jury, over the objection and exception of defendant, as follows:

"If you find from the evidence that the plaintiff and his co-employé, while working for the defendant company, were lifting a heavy grate in the discharge of their duty as the employés of the defendant company, and that the plaintiff's helper or co-employé negligently

and improperly, and without any self-sufficient ground or excuse for so doing, suddenly let go his hold on such grate without any warning to plaintiff, by reason of which the plaintiff was thrown down and injured by the weight of the iron, then that employé was guilty of negligence, and his negligence is the negligence of the defendant company in this case by the law of Kansas, and that entitles plaintiff to recover in this case." (*R., p. 71.*)

(8) The court further erred in charging the jury, over the objection and exception of defendant, as follows:

"If the plaintiff's co-employé was not guilty of any negligence, or if there was sufficient reason or justification for his act in letting go the grate at the time and under the circumstances he did, then the defendant company is not liable. It is a question of fact for you to determine, gentlemen, keeping in mind the definition of negligence which I have given to you, whether the conduct of the defendant's employé at the time the plaintiff received the injury complained of was a negligent, careless, or reckless act; or, in a word, whether it was a negligent act—one that a reasonably prudent man, standing in his shoes, would not, under like circumstances, have done. If a reasonably prudent man, standing in the shoes of Mr. Klein, would not have done the act that he did, and which is claimed resulted in the injury to this plaintiff, then he was guilty of negligence, and the company is liable." (*R., p. 71.*)

(9) The court further erred in charging the jury, over the objection and exception of defendant, as follows:

"If a reasonably prudent man, under the conditions surrounding him at the time he let go of that grate, would have done what he did, then he is not guilty of negligence, and the defendant is not liable." (*R., p. 71.*)

(10) The court further erred in stating to the jury, over the objection and exception of the defendant, as follows:

"One word more. It has been stated by counsel that there have been two previous trials of this case, in which

the jury disagreed. Gentlemen, I want to say to you that you are not expected to follow their example. This court does not have mistrials. You need not expect to get off, while I stay in this court, by leaving the case where the other juries have left it." (*R., p. 73.*)

(11) The court further erred in overruling defendant's motion for a new trial. (*R., p. 75.*)

(12) The court further erred in overruling defendant's motion in arrest of judgment. (*R., p. 75.*)

(13) Further error in this, that by the Record herein it appears that judgment was given for the said plaintiff against the said defendant, whereas judgment ought to have been given for the said defendant against the said plaintiff.

(14) And other errors appearing on the face of the Record.

BRIEF.

I.

The first question to be considered is, whether, under the answer setting up the Statute of Limitations, and upon the undisputed evidence adduced upon the trial, the court ought not to have sustained that plea and directed a verdict for the defendant.

The injury for which suit was brought herein was received by plaintiff in April, 1883, and suit was brought in Missouri, in the State court, September 25, 1885. (*R., pp. 6–7.*)

The General Statute of Kansas, 1868, Article 3, Chapter 80, provides as follows:

"SECTION 18. Civil actions other than for the recovery of real property can only be brought within the follow-

ing periods after the cause of action shall have accrued, and not afterwards:

* * * * * * *

"Third. Within two years: An action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of fraud.

* * * * * * *

"SECTION 25. When the right of action is barred by the provisions of any statute it shall be unavailable either as a cause of action or ground of defense."

It, therefore, results that, at the time suit was brought, the date of filing the original petition, it was barred in the State of Kansas. Ordinarily, statutes of limitation act upon the remedy, but not upon the right, and it may be conceded that if the provisions of the Kansas act did not operate to *extinguish* the cause of action, and if the amendment was not such a departure as that the statute ran up to the time of the amendment, the plaintiff would have had a right to maintain his action in Missouri, if otherwise enforceable; but it is insisted that said section 25, of Article 3, above quoted, had the effect to *extinguish* the cause of action.

The contention here urged has been passed upon in a case involving the same section of the Kansas statute, and which case, as in the one at bar, had been removed from the State court (Missouri) to the Circuit Court of the United States for the Western Division of the Western District of Missouri. We refer to the case of—

Finnell v. *Southern Kan. Ry. Co.* (33 Fed. Rep., 427), where the court, Thayer, J., in its opinion, states:

"I will say that, in my judgment, section 25, art. 3,

c. 80, was intended to extinguish a cause of action after the lapse of the statutory period of limitation, and not merely to bar the remedy. I can conceive of no other purpose to be subserved by the adoption of the section in question, unless it was to extinguish the cause of action as well as to bar the remedy." (*Pp. 427–28.*)

Hence, it follows that the remedy had been barred, and the right of action itself extinguished for more than five months when the original petition was filed in the State court (Missouri).

II.

The amended petition was filed in the Federal court over five years after plaintiff's cause of action accrued. It states an entirely different cause of action from that set forth in the original petition, and such cause of action was barred at the time of filing the amended petition, both by the statutes of Kansas and Missouri.

The original petition counts upon the common-law liability growing out of the alleged negligence of the defendant in retaining in its employ an incompetent servant after knowledge of his incompetency. (*R., pp. 6–7.*)

The statement that plaintiff was injured by Klein is but a statement of the *result* of the defendant's alleged negligent act in retaining him. It does not proceed upon the theory that the act of the co-servant was the act of the defendant, but recovery is sought upon the ground that the defendant was primarily liable by reason of retaining Klein after knowledge of his incompetency, and upon that ground alone. (*R., p. 7.*)

It is plain that, in such a case, it is the negligent act of the defendant in *wrongfully retaining a servant* that constitutes a party's cause of action or ground of complaint. A complete defense to such cause of action would be established by showing that the servant was not in-

competent *although he might have been negligent*, or, if incompetent, that the defendant did not know it, or could not, by the exercise of proper care, have known it.

The right of action, however, created by the Kansas statute, above quoted, and within which statute the present case was afterwards attempted to be brought by the amendment above referred to, is based upon the theory that the act of the co-servant is the act of the corporation without reference to the servant's incompetency or defendant's knowledge thereof. It creates a right, not only unknown to the common law, but expressly opposed in principle thereto.

In the case at bar the defendant had a complete defense to the cause of action set forth in the original petition, of which he was wholly deprived by the amendment. In determining whether the amendment relates back to the commencement of the action or not, a well-recognized test is whether the amendment deprives the defendant of any material defense which might have been interposed to the original petition.

The doctrine is stated by Buswell on Limitations (*page 515*), as follows:

"The principle is that where the amendment does not change the cause of action nor deprive the defendant of any defense which he had to the original suit, the plaintiff's right shall be preserved."

Here was a complete change of the plaintiff's cause of action from a common-law right to one created by the statute in derogation of the common law.

In the case of *Buntin* v. *Chicago, &c. Ry. Co.* (*41 Fed. Rep., 747*), the court, in passing upon the question of amendment, quotes the following language from the opinion of the court in the case of *Lumpkin* v. *Collier*, (*69 Mo., 170*):

"There is no case in our reports which sanctions such an amendment as was made in this. In *Lottman* v. *Bar-*

nett (62 Mo., 159), the original petition was filed by plaintiff against eight defendants, of whom Barnett was one, stating that her husband was a carpenter engaged in the construction of a building, the property of the defendants, and while so engaged was killed by the falling of the southern portion of said building, and that her husband's death was occasioned by carelessness, &c., of defendants and their servants in the construction of the building. Subsequently she dismissed as to all of the defendants except Barnett, and, by leave, filed an amended petition containing the same allegations as the original, but alleging that defendant, at the time of the accident, and for a long time previous, was the superintending architect in charge of said building, and was entrusted, as such, with the construction and completion of the same, having the entire superintendence and management of the work and materials, and that the falling of the southern portion of the building was caused by his carelessness and negligence. Napton, J., who delivered the opinion of the court, observed that 'both causes of action, or, rather, the only cause of action, asserted, either in the original petition or the amendment, was based upon the third section of our statute concerning damages.' Again: 'All the parties originally sued were in fact liable, and the case might well have been tried on the original petition.' The defendant was liable on the first petition as he was held to be on the second. The gist of the action was the same in both, to wit, the death of plaintiff's husband by the negligence of the defendant, either as proprietor or architect and superintendent of the building. It would require precisely the same evidence to support the action after the amendment as before."

The court further observed:

"I have italicised those portions of the opinion which clearly indicate the ground upon which that decision was based. The case 'might have been tried on the original petition;' this could not have been tried on the original petition. In that, 'the gist of the action was the same in both;' in this, while some of the facts are common both to the case asserted in the original and that

stated in the amended petition, the cause of action in the one is entirely different in its character from that stated in the other. In *Lottman* v. *Burnett*, 'it required precisely the same evidence to support the action after the amendment as before.' In this, the case could not have been made out on the original petition without proof of the bond, while that stated in the amended petition might have been established if there had never been an indemnity bond given."

Again, in the case of *Scovill* v. *Glasner* (79 Mo., 449), the authorities are reviewed:

"The first question presented by this record is the right of plaintiff to file the amended petition. It certainly carries the right of amendment to the extremest verge to uphold the amendment in this case. It can not, as plaintiff's counsel contends, be maintained as a rule that, because the original petition was an action *ex delicto*, any other cause of action in tort may be substituted by amended petition. If it can, an action for assault and battery might be substituted for trespass in forcibly taking plaintiff's horse; an action for slander might be substituted for a *crim. con.* action. Nor is it to be maintained that, because two actions might be joined in separate counts in the same petition, therefore the one might be substituted for the other by way of amendment. One count might be for trespass to the freehold; another for assault and battery. The discussion of this question in *Lumpkin* v. *Collier*, 69, Mo., 170, shows that the right of amendment does not necessarily obtain because the two cases stated belong to the same general classifications known to the common law and the Code. One of the tests there applied is that the evidence which would support the one would not the other. 'A defendant served with process on one cause of action, suffering a default, might be confronted with a judgment on a cause of action totally different from that which he was summoned to answer.' The least that could be exacted in the exercise of the right of amendment is that the amended petition should embrace the original cause sued on, with a like rule in respect of the measure of damages."

In *Buel* v. *Transfer Co.*, 45 Mo., 562, the court discusses the effect of an amendment on the running of the statute of limitations. The court says:

"This is an action brought under the statute for the recovery of damages. * * * It was originally instituted by the plaintiff, Ruth Buel, as the mother of a minor child, who is alleged to have been fatally injured through the carelessness of one of the defendant's servants. Subsequently to the filing of the petition, and eighteen months after the accruing of the cause of action, the petition was amended so as to introduce Samuel F. Buel, the father of the deceased child, as co-plaintiff in the action. By the statute * * * this class of actions is barred within one year from the time they accrue. Unless the amendment, therefore, has relation to the commencement of the suit, and takes effect as regards the limitation from that date, then the action is clearly barred, for it can not be sustained as to one of the plaintiffs and not as to the other. If either is barred, both are. * * * Whether an amendment, by relation, takes effect from the commencement of the suit, or only from the time of its filing, depends on circumstances. The rule is this: Where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point; but where the amendment introduces a new claim not before asserted, then it is not treated as relating to the commencement of the suit, but as equivalent to a fresh suit upon a new cause of action, the running of the statute continuing down to the time the amendment is filed."

In *Johnson* v. *District of Columbia* (*1 Mackey, 427*), Mr. Justice Cox, delivering the opinion of the court, said:

"We think the original declaration did not state a cause of action, but that such cause of action was stated for the first time in the amendment, and that it is equivalent to bringing a new suit as of the date when the amendment was filed, and that the defendant can not be deprived of the opportunity of pleading the defense of

limitations by the circumstance that this amendment, stating a cause of action for the first time, was added to the declaration filed within the statutory period, and, therefore, the demurrer to the plea was wrongfully overruled by the court below."

In the case at bar the statute had run its full course, and the cause was, therefore, barred. An entirely new charge of negligence—a new cause of action—was set forth in the amended petition. No such cause or ground of action had been asserted within the period required by the law of Kansas creating the right of action.

Indeed, we submit that the fact that there was such a departure in the amended petition in the case at bar, filed November 2, 1888, from that stated in the original petition as makes the amendment to be a new cause of action, and one up to which the statute of limitation ran, is determined by the case of *Holmes et al.* v. *Trout et al.* (7 Peters, 171, 214). At pages 202–203 the character of the original bill and also of the amended bill is stated. It will be seen that the departure in the amended bill is not so palpable and complete as it is in the case at bar, and yet the court held:

"It, therefore, follows that the title set up in the amended bill, under the decree against the heirs of Breckenridge, is a new right, and must be considered as having been first asserted by the amended bill; and as this bill was filed in May term, 1829, the statute of limitation will constitute a good bar so far as the right under the decree is asserted against the defendants, who have held adversely twenty years or upwards."

Regarding this case of *Homes et al.* v. *Trout et al.*, Wood, in his work on Limitation of Actions, note 4, p. 14, states as follows:

"If, however, a new declaration or complaint is filed, setting up a new cause of action, the statute runs until such new declaration is filed, and may be pleaded

thereto." (*Holmes* v. *Trout*, 7 Pet., 171; *Miller* v. *McIntyre*, 6 Pet., 61.)

See also to the same effect *Sicard* v. *Davis*, 6 Pet., 140; *Hewitt* v. *Penn Steel Co.*, 24 Fed. Rep., 370; *French, Trustee*, v. *Hay et al.*, 22 Wall., 246.

See also the following cases:

Buswell on Limitations, p. 515, and cases cited;
People v. *Judge, &c.*, 35 Mich., 227;
Meeks v. *R. R. Co.*, 61 Cal., 149;
Palmer v. *Express Co.*, 52 Ga., 240;
Phelps v. *Illinois, &c., R. R. Co.*, 94 Ill., 548;
Buel v. *St. Louis Trans. Co.*, 45 Mo., 562;
Ry. Co. v. *Thompson*, 16 S. W. Rep., 174;
Water Co. v. *Hill*, 26 Pac. Rep., 412;
Phelps v. *Ry. Co.*, 94 Ill., 548;
Ry. Co. v. *Ledbetter*, 9 S. Rep., 73.

The authorities above cited abundantly establish our contention that the amended petition herein states an entirely different cause of action from that declared on in the original petition, and this being so, upon the uncontradicted evidence in the case, the defendant's plea of the statutes of limitation of Kansas and Missouri should have been sustained by the court, and verdict directed for the defendant as requested.

III.

By the laws of the State of Kansas, creating the right of action and prescribing the remedy, upon which recovery was sought to be had herein, and which right of action so created was unknown to the common law, the time within which suit to enforce the same may be brought is limited to two years; such limitation of two years is, therefore, applicable to the Federal court in the State of Missouri, and the statute of limitations of Missouri can not enlarge or extend such limitation.

It is insisted that the right of action and remedy conferred by the Kansas statute (Laws of Kansas of 1874, section 1, chapter 93), and within which this case was, by amendment, in the Federal court, attempted to be brought, has attached to it the *condition* that such suit must be commenced within two years from the date when the cause of action accrued, and that the statute of limitations of Missouri can not enlarge or extend the time within which such *statutory* cause of action may be brought.

In other words, assuming that such cause of action, so conferred and *created* by the Kansas statute, could properly be brought in the courts of Missouri, the limitation prescribed by the Kansas statute of the time within which such suit can be brought, adheres to such statutory right of action, and must be followed by the courts of Missouri, and that limitation can not be enlarged by the statute of limitations of that State.

This has been repeatedly by the courts held to be the law.

In the case of *Boyd, Admr.*, v. *Clark et al.* (8 Fed Rep., 849), what was decided by the court is thus stated in the syllabus:

" Where a statute gives a right unknown to the com-

mon law, and limits the time within which an action shall be brought to assert such right, such limitation will be enforced by the courts of any State wherein the plaintiff may sue. Hence, where a statute of the Province of Ontario gave compensation for death caused by the wrongful act of another, and further provided that action should be brought within twelve months after such death, it was *held* that this limitation was also applicable to actions brought in the State of Michigan under this statute."

The opinion in the case states as follows:

"The true rule I conceive to be this: that where a statute gives a right of action unknown to the common law, and, either in a proviso to the section conferring the right or in a separate section, limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue."

The doctrine stated in this last-named case has been reaffirmed in the case of *Finnell* v. *Southern Kansas Ry. Co.* (33 Fed. Rep., 427), where, in its opinion, the court states:

"There is another class of cases in which a cause of action which does not exist at common law is created by the laws of a State. Causes of action of that character only exist in the manner and form and for the length of time prescribed by the statutes of the State which created them, and if suit is brought on such causes in a foreign jurisdiction the limitation act of the State which created the cause of action may be pleaded. (*Boyd's Admr.* v. *Clark*, 8 Fed. Rep., 849.)"

In the case of *The Harrisburg* (119 U. S., 199, 214), the court, in passing upon this same question, stated as follows:

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The

time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

See *Cavanagh* v. *Ocean Steam., etc., Co.*, 13 N. Y. Sup. Ct., 540.

See, also, *Beatty's Admr.* v. *Burne's Admr.*, 8 Cranch, 107.

If the Kansas statute of limitations were the ordinary statute of limitations, simply barring the remedy, and not one extinguishing the right of action, there might be some force in the position which asserts that such *general* statute of limitations of Kansas, simply going to the defeat of the remedy on a right of action created by the Kansas statute, would not adhere to and travel with such statutory right of action to the State of Missouri; this, because the general statute of limitations of Kansas is not expressly made to be a condition of said statutory right of action.

But it is impossible to maintain that this right of action created by the statute of Kansas, and which otherwise than by the force of the said statute had no existence, but the existence of which in Kansas is inseparably connected with the condition that the two years extinguishes, not merely the remedy, but also extinguishes the right of action, shall be permitted to migrate to Missouri and there exist in virtue of the Kansas statute creating it, but exist divested of what is inseparably connected with and made to be a condition of the right of action as created by the Kansas statute.

IV.

The court erred during the progress of the trial when the plaintiff was being cross-examined relative to what he had testified on a former trial concerning his written

statement, and when the transcript of the former trial was produced, in stating to the jury that it was perfectly obvious that the witness never said what the transcript disclosed. Such a remark was calculated to prejudice the defendant.

Halbert v. *Halbert*, 21 Mo., 277;
Thompson on Trials, Vol. 1, p. 831.

V.

The court erred in stating to the jury that there had been two previous disagreements, and that the jury need not expect to get off while the trial judge stayed in the court by leaving the case where the other juries had left it, which statement by the court was improper, and calculated to prejudice the defendant.

The jury went into the jury room in no proper frame of mind to arrive at a just verdict. They were, in effect, told that they would not be permitted to disagree; that they would be kept until they agreed; in other words, that they would be coerced into arriving at a verdict. Under such a direction the defendant could not have the advantage of a thoughtful consideration of the case.

In the case of *Chesapeake, &c., Railroad Co.* v. *Barlow* (Tenn., 8 S. W. Rep., 147), the jury, after being out nearly two days, reported that they could not agree, whereupon the court told them that it seemed very difficult for juries to agree at the present term; that they ought to agree and decide cases; that he had no idea of discharging them, but would keep them together during the entire term if they did not sooner agree. The next evening the jury announced a verdict. *Held*, that such remarks on the part of the court were reversible *error*.

VI.

The next question is whether, upon the evidence adduced, this case falls within the Kansas act (Sec. 1, Ch. 93, Laws of Kansas, 1874).

It is our contention that it does not. The character of plaintiff's employment was not such as to subject him to hazard peculiar to the operation of railroads. The business of repairing locomotives in a round-house is not attended with risks of a different character from those to which a servant would be subjected in repairing stationary engines or machines in factories, or the lifting or placing of heavy timbers or iron in the construction of buildings, or any other kind of employment where a servant is subjected to the risk's of a co-servant's negligence in allowing heavy material which they are lifting or carrying to fall.

If the act were extended to the case at bar, it would be open to the objection that it is class legislation, for, in the language of the courts, it would not apply upon the same terms to all in the same situation. The Kansas act is copied from the Iowa act of 1862. That act was construed in the case of *Deppe* v. *Railroad Co.* (36 Iowa, 52), where the court said:

"The manifest purpose of the statute was to give its benefits to employés in the hazardous business of operating railroads. When thus limited, it is constitutional, when extended further it becomes unconstitutional."

The Supreme Court of Kansas adopted this construction in *Railway Company* v. *Haily* (25 Kansas, 35).

See, also—

Union Trust Co. v. *Thomason*, 25 Kan., 1;
Missouri Pac. Ry. Co. v. *Mackey*, 33 Kan., 298;
Railway Co. v. *Koehler*, 37 Kan., 463.

Some expressions in later Kansas cases would seem to indicate that the tendency of the court was to extend the act farther than justified by the construction placed upon it in 25 Kansas (*supra*), though in each case, unlike the present, the injured employé was subjected to the peculiar hazards of railroading.

We would especially call attention to the case of *Johnson* v. *St. Paul and D. Railroad Co.* (45 N. W. Reporter, p. 156). In that case a crowd of men, of which plaintiff was one, was engaged in repairing a bridge of defendant's road, and, in performing the work, it was necessary to leave the draw partly open. Through the negligence of one of the crew, the draw was left unfastened and was blown shut by the wind, and injured the plaintiff while at work between the stationary part of the bridge and the draw. *Held*, under a statute identical with that of Kansas, that defendant was not liable. Without quoting at length from that case, it may be said that it furnishes conclusive reasons why the act should not be extended to cases like the present.

VII.

The next question is, whether there was any evidence from which the jury had a right reasonably to infer that the injury to the plaintiff resulted from any negligent act of Klein.

It is our contention that the court should have directed a verdict for the defendant upon the ground that there was no evidence in the case justifying an inference of negligence.

Leaving out of consideration plaintiff's written statement as to the cause of the injury, what facts and surrounding circumstances were proven that justified the court in applying the maxim, "*Res Ipsa Loquitur?*"

It was undisputed that the plaintiff and Klein, when attempting to lift the grate, were in a very confined position, subjected to the risks of hitting their heads upon the locomotive or slipping; they were standing, or, rather, crouching, back to back; the plaintiff could not see his helper. He stated, in his testimony, that he did not know what caused the grate to fall. In his written statement he attributed the cause of his injury to the fact that the place in which they were working was inconvenient and unsuitable. He says that—"Just as we "were in the act of placing the front grates, the heaviest "of all, my helper, in consequence of the small working "space, came in contact with the mud-ring, thereby "causing him to drop his hold on said grates." He adds: "Had the pit been in good order, and we would "have had the proper space to perform our duty, the re-"sult would not have been as it now is."

Upon a former trial plaintiff testified that his helper's head struck against something above and he dropped the grate. His language was, "he struck his head and "dropped it and said something, * * * or some-"thing, and left it." (*R., p. 42.*) Upon the last trial he testified, without objection from either party, that Klein claimed to him the next morning that the reason why the grate fell was because he struck his head. When Klein went out of the pit he had his hand on his head; the language which he used when he was going out was more consistent with the idea that he was cursing the foreman for having required him and the plaintiff to work in such a place, than that it was an expression of anger toward the plaintiff. Indeed, there was no reason why he should be angry with Wyler; they never had had any trouble, were good friends, and continued to be after the accident.

Where two men are carrying a heavy weight, and it appears they are strong enough under ordinary circum-

stances to carry it, and, without any explanation whatever, one of them lets it fall on the other, this state of facts would probably raise a presumption of negligence.

But that is not this case. Here, taking into consideration the condition of the pit, the constrained position of the men, the weight of the iron they were attempting to replace, the fact that, as they were attempting to replace it, Klein struck his head against something, renders it just as reasonable, if not more reasonable, to infer that Klein was not able in the exercise of ordinary care to prevent the grate from slipping off his shoulder, than that he was able so to do; and when the plaintiff's account is taken in connection with his written statement forwarded the company before the suit was brought, it is difficult to conceive upon what principle the court submitted the case to the jury.

We contend it is only in those circumstances where the occurrence of an accident which under ordinary circumstances would not have happened if due care had been exercised, that a presumption of negligence arises; or, in the language of Baron Channell, in the case of *Bridges* v. *North London Railway Co.* (L. R., 6 Q. B., 377–391), where it is shown that the accident is such that its real cause may be the negligence of the defendant and whether it is so or not is within the knowledge of the defendant, the plaintiff may give the required evidence of negligence without himself explaining the real cause of the accident, by proving the circumstances and thus raising a presumption that if the defendant does not choose to give an explanation the real cause was negligence on the part of defendant. The surrounding circumstances must be more consistent with the negligence of the defendant than with the absence of it.

An important feature in this case is that, owing to the death of Klein, defendant was never able to make a further explanation of the circumstances surrounding the accident, and it is obvious that in such a case the plaintiff

ought to be required to make out a stronger case for the application of this maxim than when it is in the power of the defendant to explain. Indeed, considerations connected with the burden of proof have often an important bearing on the application of this rule. It is true that ordinarily there is no very direct connection between the legal value of certain facts and the question as to which party is bound to prove these facts. But where, as in the cases already cited, the circumstances surrounding the accident, which the plaintiff is able to show, are meagre and the defendant, from the very nature of his situation, is presumptively able to explain them fully, and yet fails to offer any explanation, the question becomes, to some extent, a question of juridical policy.

VIII.

The alleged cause of action, founded upon the statute of Kansas, was not enforceable in the Federal court in Missouri.

As to whether the cause of action created by the Kansas act could be enforced in Missouri, where the common-law rule as to injuries inflicted by one servant upon a co-servant prevailed, we will merely say that we do not think that the case of *Dennick* v. *R. R. Co.* (103 U. S., 11), controls the question, and for the reason that the Missouri courts hold that the rule that a master is not liable for injuries resulting to one servant through the negligence of a co-employé is founded on "principles of public policy." If the rule in both States had been similar the doctrine in the Dennick case would apply.

See *Vawter* v. *Missouri Pacific Ry. Co.*, 84 Mo., 679.

In the case of *Texas and Pacific Ry. Co.* v. *Cox* (145 U. S., 593), the court held what is thus expressed in the syllabus:

"A cause of action founded upon a statute of one State,

conferring the right to recover damages for an injury resulting in death, may be enforced in a court of the United States sitting in another State *if it is not inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced.*"

IX.

The Court Improperly Charged the Jury.

With reference to the charge of the court, we desire to call special attention to paragraph five, which is as follows:

"If a reasonably prudent man, under the conditions surrounding him *at the time he let go of that grate, would have done what he did*, then he is not guilty of negligence and the defendant is not liable."

This instruction is open to two objections:

First. It assumes as a fact that Klein "let go of the grate," whereas, assuming that the case should have been submitted to the jury at all, it was for the jury to say whether Klein let go of the grate by a voluntary act or whether it was knocked off his shoulder or fell in consequence of some cause beyond his control.

Second. It is misleading in this, that the jury may have supposed that the language and conduct of Klein in running out of the pit and leaving plaintiff might constitute a part of defendant's negligence.

For all of the foregoing assigned errors, the judgment below should be reversed.

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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 217.

THE UNION PACIFIC RAILWAY COMPANY,
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vs.

OTTO WYLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

ADDITIONAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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The following cases and points are suggested by propositions contained in the opposing briefs, and which briefs were not seen by counsel for the plaintiff in error until after the plaintiff in error's brief was printed and filed:

Mr. Phillips' brief, at page 3, *et seq.*, takes the general position, stated in various forms, that the amended petition of the 2d of November, 1888 (*R., pp. 18, 19*), does not present a new case or cause of action in such sense that the limita-

tion, applicable to such cause of action, runs from the date of the injury up to the date of its filing (in this case from the — day of April, 1883, the date of the accident, until the filing of the last amended petition setting up the Kansas statute, on the 2d of November, 1888, being a period of five years and six months)—that this last-named petition of November 2, 1888, is not a new cause of action because in both the original petition (*R., pp. 6, 7*) and in the last amended petition (*R., pp. 18, 19*) the cause of action alleged is the negligence of the company acting by its employé Klein, resulting in the injury—that the reference in the last amended petition to the Kansas statute did not make a new cause of action, but only particularly set forth the grounds upon which liability was sought to be established—that if that statute had not been cited, it would not be contended that the cause of action was changed.

His position is that the citation of the statute was not necessary. This is inferable from this part of the brief, and it is insisted that reliance on the Kansas statute, in aiding to make out the cause of action, is not analogous to cases where the action is for wrongfully causing death.

We now turn to a statement of certain propositions, and of the authorities which sustain them, in reply to these general positions of the opposing brief, and in reply to some others not fully anticipated by us before we saw our opponent's briefs.

First.

It is not accurate to say that the original and the last amended petition alike count upon the negligence of the company acting through Klein. It is true that in both the negligence of the company is relied on. But, in the first, the negligence of the company is explicitly averred to be in retaining, as its employé, a person known to be incompetent and unfit (*R., pp. 6, 7*): Whereas, in the last amended petition, the negligence counted on is the egligence of

Klein, who is alleged to have caused the injury by reason of dropping the grate, &c. (*R., p. 18.*)

All averments found in the first petition regarding the incompetency of Klein, and knowledge thereof by the company, and the company's retention of his service after such knowledge, are dropped; and the averments of the provisions of the Kansas statute, making railroad companies liable for injuries caused by the negligence of *any* agent or employé of the company, whether a fellow-servant with the party injured and suing or not, and said amended petition further expressly state that "*by reason of the premises the plaintiff had and has a cause of action against the defendant under and by virtue of the statutes of Kansas in such cases made and provided*, sec. 1, chapter 93, Laws of Kansas of 1874, which reads as follows."

Now, the following suggestions will establish, not only the point that these changes were not merely adding a new "particular" to the grounds of action set forth in the original petition, as stated in the opposing brief by Mr. Phillips (*p. 3*), but were, according to the very letter of the averments of the amended petition, where it avers "that by virtue of the Kansas statute, a cause of action against the defendant is furnished and pleaded," the introduction of a cause of action not existing at common law, and, in that regard, radically, a departure from that in the first petition, relying, as it does, alone on the retention of an incompetent servant after knowledge of incompetency, such retention resulting in the injury charged.

Not only these changes are made by this last averment, but in fact the original petition stated *no* cause of action whatever except said retention of a known incompetent, because, by the laws of the forum where the suit was brought, and which control throughout the prosecution, whether in the State or Federal court, no cause of action whatever appeared on the face of the first petition, since it expressly stated and showed that Klein was a "fellow-

servant" with the plaintiff, and so engaged in repairing the fire-box and placing in position the fire-dump. Thus the face of the petition shows that, if the injury declared on in the first petition is one resulting alone from the negligence of Klein, and not at all from the negligence of the company, in knowingly keeping an incompetent employé, then the original petition showed no cause of action whatever based upon the mere negligence of Klein. This is so because, by the laws of Missouri, the negligence of a "fellow-servant" does not make the employer liable.

It was plainly and palpably because of the decision to base a new cause of action on this statute of Kansas, creating a cause of action for injuries resulting from the negligence of any employé or agent of the company, whether a "fellow-servant" or not, that led to this last amendment.

We now proceed to show that, without this amendment, a recovery in the case was impossible, unless had upon the common-law ground stated in the first petition, and the one there solely relied on, to wit, that the company had retained a known incompetent, whose incompetency caused the injury; and that no use could be made of the statute of Kansas in making out a cause of action, or in dispensing with the law of non-liability of the employer for negligent injury of a "fellow-servant" unless this Kansas statute were pleaded as it was by the amendment.

It will hardly be claimed by the defendant in error that the original petition contained two distinct and independent causes of action—one in that the company negligently retained a known incompetent, and the other that Klein negligently caused the plaintiff's injury.

The truth is, we submit, that the entire substance and effect of the first declaration is the negligence of the company in retaining Klein with knowledge of his incompetency, and the added averment in the original petition that Klein's negligent conduct resulted in plaintiff's injury was a subordinate and indispensable averment, without which

the averment as to the negligent retaining of Klein would have been utterly insignificant, and would have shown no cause of action.

The two averments, therefore, to wit, the negligent retaining and Klein's negligently causing the grate to drop, make out one cause of action.

This being so, it becomes quite plain that the cause of action stated in the last amendment is totally and radically different from that set out in the original petition, because it relies, not on the negligent retaining at all, but totally ignores and drops it, and, in lieu thereof, sets up and asserts a liability having no existence, either at common law or under the laws of Missouri, and which, as is accurately and expressly averred by the said last amendment, was had by virtue of the quoted Kansas statute.

It seems to us, and we respectfully submit it to the court, that it would be impossible to state a case of more radical departure from the original petition than is furnished by this amendment, totally abandoning the common-law right of action asserted in the first petition, and substituting, in lieu thereof, an alleged cause of action created by a foreign statute and having no existence whatever in the absence of such statute.

In this connection we further add that Mr. Phillips is mistaken in his contention that, in an action of tort founded wholly upon a statute and unknown to the common law, the declaration in a court of general jurisdiction need not count upon the statute itself if a public one. Whilst it may not be necessary in such case to set out the terms of the statute, the declaration must count or rely on the statute by some appropriate words. See 1 Chitty's Pleadings, s. p. 218.

It, therefore, results, from what has been now gone over, that the so-called amended petition was not an amendment of the original petition, but was, in fact, the statement of a new cause of action, as to which the statute of limitations

had run up to the time of its filing, and at which time such action was barred, not only by the laws of the State of Kansas, as has been above shown, but also by the laws of Missouri.

That such a departure from the original petition is not within the right of amendment, except subject to the rule that the statute shall run from the time of the injury to the filing of the last amendment, is established by the following cases cited in our printed brief:

Buntin vs. R'y Co., 41 F. R. 747, Brief, pp. 13, 14;
Scoville vs. Glasner, 79 Mo. 449, Brief, p. 15;
Buel vs. Transfer Co., 45 Mo. 562, Brief, p. 16;
Johnson vs. U. P., 1 Mackey 427, Brief, pp. 16, 17;
Holmes vs. Trout, 7 Pet. 171, Brief, p. 17;
Wood, Limitation of Actions, note 4, p. 14, Brief, p. 17.

To these cases we add the following:

The case of *Railroad Co. vs. Lacy* (49 Ga. 106) is reported in the recent work of Tiffany on Death by Wrongful Act, in note 58 to section 202, in these words:

"There the suit was originally brought in the name of the wife for the death of her husband in Alabama, and the declaration did not allege the laws of that State" (just as in the case at bar the original declaration did not allege the act of Kansas). "It was held that an amendment after the year limited by the Alabama statute, setting up the laws of that State, could not be allowed because it set up a new cause of action, but also because by the Alabama law the action was not maintainable by the wife."

The court concludes its remarks, to the effect above quoted, in the following language:

"The plaintiff, by her amendment, introduced a new cause of action, given to her by the statute law of Alabama" (precisely as is done in the case at bar) "and asked the court, in the spirit of comity, to enforce that new cause of action in this State."

This the court refused to do.

The following cases conclusively establish the proposition that the amended petition in this case sets forth a new cause of action:
Bilton v. Ga. Pacific RR. 10 S.E. Rep. 352
Opposition Cotton C. v. Railroad 10. S.E. Rep. 113,
Langdon v Railroad 9 N.Y. Sup. 245.

Second.

The next proposition which we wish carefully to fix in our argument, and in the notice of the Court, and which is not fully developed in our printed brief, we state as follows:

As we have already seen, the right of action presented by the last amendment is one which, if it exists at all, exists only (here adopting the words of the last amended answer) "under and by virtue of the Kansas statute in such case made and provided," &c.

That is, the right of action now asserted by the last amendment is the right of recovery against the company for negligence shown by the very words of the last amendment to be the negligence of a fellow-servant, and hence a negligence which furnishes at common law, and under Missouri law, no right of action whatever, and which right of action springs out of, and is dependent upon, the provisions of the Kansas statute, which ordain "that every railroad company organized or doing business in this State (Kansas) shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents or by any mismanagement of its engineers, or other employés, to any persons sustaining such damage."

Thus the non-liability of employers for injuries to an employé by a fellow-servant is completely abolished, and, in lieu thereof, a statutory liability is created, whereby the employer is made liable for damages resulting from the negligence of any agent or employé of the company, whether such agent or employé be a fellow-servant or not.

Such is the undisputed effect of this Kansas statute first pleaded in this last amendment of November 2, 1888, more than five and a half years after the cause of action arose.

The defendant in error seeks to import into the State of Missouri a right of action unknown to the laws of that State,

and to recover on a statutory right created and existing only in and by virtue of said statute of Kansas, and to make the importation into Missouri of this right of action divested of the limitation and condition which is attached to it in the State of Kansas, where no recovery can be had on this statutory right except upon the condition attached to it by the Kansas law.

This condition, attached to this new statutory right, is found in section 3 of the General Statutes of Kansas of 1868, art. 3, chap. 8, and which is set out in our brief at page 11. The substance of this condition is to limit the right to bring all actions for injury to the rights of another, not arising on contract (and of which class of actions the present is one), to two years. Section 15 of the same statute provides, that where, in special cases, a different limitation is prescribed by statute, that there the action shall be governed by such limitation. Section 25 of the same statute provides that when the right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

In the case of *Halsey vs. McLean*, decided in 1866 (12 Allen, 438, 443), it was sought to make a stockholder of a certain New York corporation liable for the debts of the company jointly and severally along with other trustees of the company for all debts contracted before the making of a certain prescribed report. The liability created by this New York statute was sought in this action to be enforced against the trustees in the Massachusetts court, but the New York statutes had received in New York an interpretation by which the trustees were not liable for debts contracted by their predecessors and chargeable to the latter for their default, but only for debts contracted while they were in office.

By section 24 of the New York statute it was made an indispensable condition to the liability of a stockholder for the payment of any debt contracted by the company, that

suit for its collection be brought against the company within one year after such debt shall become due. The plaintiff in that case had lost his right to the particular remedy prescribed by the New York act, according to the interpretation of the act in the New York courts. The court refused to give the creditors suing the benefit of this statutory right of action except along with the conditions imposed by the act, and, therefore, the court, at page 443, uses the following language:

"If we are possessed of any jurisdiction to administer the remedy conferred by this section, comity would not require, nor justice permit, that it should be administered here in a case where, by the plaintiff's own neglect, it had ceased to exist in New York."

The effect of this case is thus stated in Wood on Limitation of Actions, page 20, in a note:

"When a right of action has expired by limitation of the statute of another State, by which alone the right is created, no action can be maintained thereon in another State."

It is true that in the case at bar the condition attached to this statutory right of recovery given by the Kansas act and making employers liable, for all damages resulting from the negligence of any employé, whether the injury is to a fellow-servant by a fellow-servant or not, to wit, the condition that the action must be brought within two years, is not created by the same statute that creates the statutory right of action. Still, it is a condition as absolute, as unescapable, as if it were created by the same act that creates the statutory right of action, and in Kansas, where this right is created, no recovery is possible unless the action is commenced within two years.

Hence, it is in principle not at all distinguishable from said case of *Halsey vs. McLean* (*supra*), and is, with it, equally

an absolute condition and limitation of and upon this statutory right of action.

In pages 19 to 21 of our brief the cases are cited, including the cases from this Court such as *The Harrisburgh* (119 U. S., 199, 214), all going to the same effect as the case last cited from 12 Allen, and holding, in substance, that, where a new statutory right is sought to be imported into another State or jurisdiction than that where the statutory right was created, it must be there taken along with the conditions to which it is made subject by the law of the place where it was created.

From the foregoing it results that the statutory cause of action set up in the amended petition was barred in Missouri when this action was there commenced, and the court erred in failing to direct the jury to find for the defendant as was asked below (*R., p.* 68).

Third.

There is, we submit, another and distinct principle upon which the decision of the court below, enforcing, in the State of Missouri, a right of action not existing at common law or under any law or principle in force in Missouri, but repugnant to the policy of that State, and created exclusively by a statute of Kansas, must be reversed.

That principle is one that is distinctly recognized in the case of *Railroad Co. vs. Cox* (145 U. S. 593). This was a case which, like the present one, was tried and adjudicated in a circuit court of the United States. The principle of law here relied on by us is thus stated in the following paragraph of the head-notes:

"A cause of action founded upon a statute of one State, conferring the right to recover damages for an injury resulting in death, may be enforced in a court of the United States sitting in another State *if it is not inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced.*"

This statement is exactly equivalent to one asserting that if the cause of action founded upon the statute of one State, and which is sought to be enforced in another, *is inconsistent* with the statutes or public policy of the State in which the right is sought to be enforced, then it will not be enforced in the latter State.

It would, we submit, be difficult to name a class of cases, or a principle of general law, relating to trade and commerce, which enters into and affects the public policy of a State more directly and profoundly than does this matter as to whether all common carriers shall be liable for the negligence of *all* their agents and employés or shall only be liable for injuries not inflicted by fellow-servants, or, in other words, for injuries that were not, within the contemplation of the contract of employment, assumed by the employé.

Text-writers on this subject declare that the opinion of Chief Justice Shaw in the case of *Farwell vs. Railroad Co.* (4 Metcalf, 49, 57) lays down this principle of non-liability of an employer to an employé for injuries coming within the contemplation of his contract of employment "with great elaboration, and that the case is the leading American case on that subject." (*See Buswell on Personal Injuries, pp. 367–'8.*)

In this opinion of Chief Justice Shaw, speaking of this exemption of carriers from liability for injuries to an employé which come within the contemplation of the contract of employment, he says:

"The general rule, *resulting from considerations as well of justice as of policy*, is that he who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such service, and, in legal presumption, the compensation is adjusted accordingly."

There can be no reasonable doubt of the accuracy of this statement of Chief Justice Shaw as to this matter being one which vitally affects the internal policy of the States.

Therefore, neither a State court nor a United States court is permitted to force upon the State of Missouri a provision of the statutes of Kansas which is repugnant to her fixed and settled policy touching this immensely important matter of the liability of common carriers. Her citizens, whether corporations or individuals, will not be compelled by the courts of the United States sitting in Missouri to have forced upon them a policy or principle of general law repugnant to the institutions of Missouri.

There is no comity as between the States which requires such a sacrifice on the part of any State, or the citizens thereof. The case of *Bank of Augusta vs. Earl* (13 Pet. 519), decided in 1839, was one where a United States court was called upon to determine what comity existed as between the States of this Union in regard to enforcing the laws of one State within the courts of another. The last paragraph of the syllabus in that case is in these words:

"*When the policy of a State is manifest, the courts of the United States would be bound to notice it as part of its code of laws, and to declare all contracts within the State repugnant to it to be illegal and void.*"

The court, in this case, makes the comity due, as between these States, to be substantially the same as that which exists as between the different civilized and enlightened countries which are recognized as being under the law of nations. In another paragraph of the head-note, the following is stated:

"Courts of justice have always expounded and executed contracts made in a foreign country according to the laws of the place in which they were made, *provided that the law was not repugnant to the laws or policy of their own country. The comity that is extended to other nations is no impeachment of sovereignty. It is the voluntary act of a nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests.*"

The same thing is announced in the opinion of the Court by Chief Justice Taney. At page 589, speaking of the comity between the States and also as between independent nations, the Court says:

"The comity that is extended to other nations is no impeachment of their sovereignty. It is the voluntary act of the nation by which it is offered, *and is inadmissible when contrary to its policy or prejudicial to its interests.*"

From Story's Conflict of Laws Chief Justice Taney quotes as follows:

"In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government *unless they are repugnant to its policy or prejudicial to its interests.*"

It is, therefore, plain that, if this statute of Kansas, creating a right of action unknown to the common law and to the laws of Missouri, is to be imported, either by a State court or by a United States court, into Missouri, this can only be done when such importation is *not contrary to the public policy on the subject of liability of common carriers which is enforced by the laws of that State.*

It is in enforcement of this exceedingly important principle that such cases as the following have been decided:

(*a.*) That the exemption laws of a State cannot be enforced in another State contrary to the laws of that other State. See *Morgan vs. Nevill* (74 Penna. St. 52).

(*b.*) Statutes relating to married women have no extra-territorial operation. *Waldron vs. Ritchings* (3 Daley, N. Y., 288).

(*c.*) The Statute of Frauds of one State does not apply to a parole sale of lands in another State. *Sigel vs. Robinson* (56 Pa. St. 19).

(*d.*) A statute giving a landlord the right to follow and distrain goods fraudulently removed does not authorize a

seizure of them in another State contrary to the policy of that other State. *Kelly vs. Davenport* (1 Brown, Pa., 231).

(*e.*) The New York statute forbidding the use of fictitious firm names cannot be enforced in another State by non-residents. *Ross vs. Wigg* (34 Hun., 192).

(*f.*) An Indiana statute giving the right to recover a penalty to one injured by an incorrect transmission of a telegraphic message has no application to a contract made in another State to send a message from that State to Indiana. *Carnahan vs. Western Union Telegraph Co.* (89 Ind. 526).

(*g.*) A non-resident debtor cannot invoke the exemption laws of the State in which his property is attached, nor can his non-resident widow assert her dower rights in such property. *Kyle vs. Montgomery* (73 Ga. 337).

The fact is that this principle is universal as between the States, that the statutes of one State will not be enforced in another where the laws of the latter have rejected the policy embodied in the statute sought to be imported.

We, therefore, now appropriately present a few specimen decisions indicating conclusively what is the policy of Missouri upon the subject of making her common carriers liable for injuries to employés from acts which, by the contemplation and terms of the employment, were excluded from those for which the employer should be liable.

The law of Missouri, as decided in the following cases, is that a servant cannot recover for injuries received through the negligence of a fellow-servant when the principal is not in fault.

Devit vs. Pacific Railroad, 50 Mo. 302;
Thorp vs. Railroad, 89 Mo. 650;
Pettigrew vs. St. Louis Ore & Steel Co., 14 Mo. App. 441;
Marshall vs. Shricker, 63 Mo. 308.

In *McGowan vs. Railroad* (61 Mo. 532), decided in 1876, the court goes to the extent of holding what is thus expressed in the opinion:

"*Prima facie* all servants of a common master employed in running, operating and rendering service with trains of cars are fellow-servants. If there are facts which show that this relation does not really exist between all such servants, the burden of showing such facts is on him who seeks to avail himself of the absence or non-existence of such relation. This court cannot take judicial notice of the duties required of or performance by such servants, nor of the degrees of supremacy or subordination existing among them."

In *Blessing vs. Railroad* (77 Mo. 410) the syllabus states:

"In an action against a railroad company to recover for the death of an engineer killed while on duty through the negligence of the train-despatcher, the plaintiff failed to show that the engineer and train-despatcher were not fellow-servants. *Held* that for this omission the plaintiff was properly nonsuited."

In the opinion it is held:

"If the death of Blessing was occasioned by the neglect or carelessness of a fellow-servant, the defendant is not liable."

Under the ruling of the court below, enforcing in Missouri a statute of Kansas, embodying principles and rules of liability on the part of common carriers, which are wholly discarded by Missouri—discarded by the principles of the common law, and discarded by most of the States of the Union—the court has made it so that a citizen of Missouri, whether a corporation or a natural person, engaged in commerce as a carrier, shall be held liable for injuries done, in any other State of the Union than Missouri having a statute like that of Kansas, to one of the employés of such carrier, although said injury was fully taken into contemplation in the contract of employment, and the liability thereto was fully compensated for by the compensation secured in making the employment, and this although the law of the State

where the court enforces such liability is directly repugnant to the creation of such liability and wholly discards the principle and policy which asserts it.

We submit that this Court will not pronounce a judgment, in this case, enforcing rules of universal liability, repugnant alike to the principles of the common law, repugnant, as declared by Chief Justice Shaw, to the principles of justice and wise public policy (4 Metcalf, 57), and repugnant to the principles and public policy of the State where the court undertakes so to enforce the foreign statute.

SAMUEL SHELLABARGER,
J. M. WILSON,
A. A. HOEHLING,
For Plaintiff in Error.

15,285

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 217.

THE UNION PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

OTTO WYLER.

Notes of Oral Argument of Samuel Shellabarger on Behalf of the Plaintiff in Error.

I.

It is proper to here show the inaccuracy of the position of the defendant in error, which asserts that while Lord Campbell's act must be relied on and pleaded in an action thereon, because this is a "purely statutory" action, yet this Kansas statute, creating a new right of action unknown alike to the common law and to the law of Missouri, need not be alluded to or in any *express* way set up in the pleadings in order to recover under that statute, even in a State foreign to the one where the statute creates the right of action.

The replies which show the inaccuracy of this position may be stated as follows:

First. By showing that this Kansas right of action is as new, as unknown to the common law and to the law of Missouri, and as impossible to be maintained in States where the statute does not exist as is Lord Campbell's right of action.

Second. By showing that this Kansas statute and Lord Campbell's act are identical also in the fact that in both cases the acts must be alleged and proved. Acts and facts which are indispensable parts of rights of action existing at common law, and to which the statute simply adds an element or provision which, added to said other facts, makes out and creates the statutory right of action, to wit, under the Kansas act, adds the provision that the wrong inflicting the injury need not be the act of *another* than a fellow-servant, and under Lord Campbell's act the added element of the statutory right of action is that resulting death shall not defeat the right of action which the same facts create at common law where death does *not* result.

Third. By showing that on general principles of pleading in a statutory action unknown to the common law, and which is not maintainable except in virtue of some statute, there the declaration must, even in a court of *general* jurisdiction, and even where the statute pleaded is a *general* law, and even where the *forum* is of the same State which created the new statutory action, there must be that in the declaration which shows that the statute is relied on. The provisions of the statute need not be set out, because in such a case the court takes judicial notice of the provisions of the statute; but even there there must be *some* general allusion to the statute as the foundation of the action, and that allusion is usually made by adding, after the statement of the facts making out the case, the words "according to the

statute in such case made and provided," "against the form of the statute in such case made and provided," or some such an equivalent declaration of reliance on the statute. (1 *Chit. Pld.*, 218.)

Fourth. By showing that the authorities, directly and explicitly, establish the proposition that the declaration must express its reliance upon the statute where the action is maintainable *alone* by virtue of the statute.

Take, for example, the case of *Bolton vs. Georgia Pacific Railroad Company* (10 S. E. Rep., 352), and which is noted in manuscript at the bottom of page 6 of plaintiff in error's additional brief. There the court expressly declares that the fact that the original declaration omitted all reference to the statute attempted to be introduced by an amendment of the original declaration, which made no allusion to the statute, was not aided by the fact that while the original declaration did not rely on the statute its right of action was not helped out or the statutory right made to be available, because of the fact that such original declaration did set out all the facts which were necessary to bring the case averred in the original declaration within the right of action created by the statute, the court declaring that all such averments in the original declaration became and were mere *surplusage*, of which the court could not take notice, because the declaration did not rely on the statute which would render competent and material said averments bringing the case within the statute.

The reason why counsel for defendant in error very naturally seek to distinguish between the necessity of relying on the statute where Lord Campbell's act furnished the right of action and the case at bar, where the Kansas statute furnishes the right of action, is the fact that the cases are exceedingly numerous and, we believe, unanimous in holding that where Lord Campbell's act is sued on in a State different from that in which the cause of action arose and

in which the right of action is given by a statute equivalent to Lord Campbell's act the declaration in such foreign State must, in terms, rely upon and plead said act.

Unless, therefore, Mr. Phillips can show that in this respect Lord Campbell's act differs from the Kansas act he must fail in his attempt to show that the Kansas act is virtually set up and pleaded, although not mentioned, in the original declaration, and that therefore the introduction of the Kansas act into the last amended petition is not a resort to a new cause of action which is defeated by the five-year limitation of Missouri.

The concluding words of section 195 of Tiffany on Death by Wrongful Act (p. 251) are:

"Where the wrong is one for which the right of action is purely statutory no presumption arises that such statute is in force outside of the State which enacted it. Since the right of action for death is statutory, it follows that if the death occurred outside of the State which enacted the statute no action can be maintained by virtue of it. * * * Thus where the death was caused in New Grenada it was held that no action was maintainable in New York, although the defendant was a corporation of that State (citing *23 N. Y., 765, and several other cases*). So it has been held where death occurred on the high seas and in a State where no right of action existed (citing *143 Mass., 301*); and if the action is based upon the foreign law it cannot be maintained if that law is not alleged and pleaded."

Citing, in note 5, page 251, to this last proposition:

Vanderwerken vs. Railroad, 6 Abb. Pr., 639.
Beach vs. Bay State S. Co., 30 Barb., 433.
Deboise vs. Railroad, 98 N. Y., 577.
Kahl vs. Railroad, 10 S. Rep., 661.
Railroad vs. Lacy, 43 Ga., 461.
Railroad vs. Schroeder, 18 Ills. App., 328.
Hyde vs. Railroad, 61 Iowa, 441.
State vs. Railroad, 45 Md., 41.
Railroad vs. Eakin, 6 Coldw., 582.

The same result is reached by the cases generally, namely, the result that the United States courts and the State courts, trying a cause of action in Missouri which has no existence except by virtue of a statute of Kansas and where the declaration wholly ignores the Kansas statute, cannot be maintained in Missouri (the Kansas statute not being pleaded) by reason of the fact that the original declaration makes averments which would bring the case within the Kansas statute.

For example, in the case of *Deboise vs. Railroad* (98 N. Y., 377-'9) the court says, where the action was for wrongfully causing death, resulting in a liability created by a New Jersey statute:

"This right of action depends entirely upon statute law" (precisely the same thing being true in the case at bar, the right of recovery in Missouri for an injury resulting from the negligence of a fellow-servant in the absence of wrongful act by the employer depending entirely upon the statute of Kansas). "Such a right of action did not exist at common law. There was no proof that the common law of New Jersey had been changed or that any statute existed there authorizing an action to be maintained to recover damages against one who has negligently caused the death of another. Our statute has no extraterritorial effect, and we cannot infer or presume that a similar statute exists in New Jersey. There was, therefore, a vital defect in the plaintiff's proof."

The same thing will be found in the following cases in New York:

Leonard vs. Navigation Co., 84 N. Y., 48.
McDonald vs. Mallory, 77 N. Y., 547.

From the foregoing the result is, we think, conclusively reached that the original declaration contains nothing that would entitle the plaintiff to recover in virtue of the Kansas statute, it not being in any way pleaded or relied on. Therefore, if a change, by amendment, from a declaration on a

common-law right of action to a right of action existing only by virtue of a statute of a State different from that of the *forum* is not the introduction of a new cause of action, then it would be impossible, we think, to state or conceive of a case that would be a change of the cause of action.

Hence, when this new cause of action was introduced on the 2d of November, 1888, five and a half years after the cause of action accrued, it was barred by the five-year statute of limitations of Missouri.

II.

We desire now to allude a little more fully to what Mr. Hoehling presented, regarding the legal effect of the two parties to an action which had no existence except in virtue of a statute specially creating a statutory right, as does this Kansas statute, which had no existence outside of the statute, and where the statute of that State, although not the same act that created the right, *extinguished* the statutory right unless asserted by suit within a prescribed period, and both parties so living in said jurisdiction there resided until the statutory right of action was barred or extinguished; there, and in such case, the party who originally possessed such statutory right cannot, by finding and suing the defendant in another State, where the general statute of limitations would not extinguish the right (provided the same statute which in another State created the right were in existence in the State of the *forum*), enforce this statutory right, so *extinguished* in the State creating the right.

It must be observed that this position is not one that is repugnant to the general rule that the statute of limitations of the *forum* is the one which controls the duration of the remedy. Our position is consistent with that general principle of law, and it only asserts that you cannot transfer to another State of the Union than Kansas a special and peculiar statutory right of action which exists only in virtue of

a Kansas statute, and which, by virtue of the Kansas statute, had ceased to exist.

Justice HARLAN: Suppose, Mr. Shellabarger, the limitation of this special statutory right of action created by the statute of Kansas named in the last-amended petition was, under the Kansas statute, limited to five years instead of to two years, and that the Missouri statute limited the right of action to two years, then could the statutory right of action be maintained in Missouri for the five years during which the right of action lived in Kansas by her laws?

Mr. SHELLABARGER: To that our reply is, that since this statutory right of action is one that can exist in Missouri and be there enforced, if it can be there enforced at all, only in virtue of the comity due to each other as between the States, and that no part of the law has any existence in Missouri except as it is carried into Missouri by the law of comity due as between the States, and as the statute of Kansas alone is that which creates and measures the qualities and duration of the right of action, and as the Kansas statute of limitation, in the case you put, of five years enters into and becomes a part of the right of action, therefore if said comity will import into Missouri any part of the act it must import it just as it is with its five years' life upon it; but our position is that comity will not in this case inflict on Missouri any part of this right of action.

Our position asserts that this special, specific, and local statutory right is by the Kansas statute made to be subject to the Kansas limitation, which limitation in Kansas puts an end to the statutory right. It would be, as seems to us, an anomaly that the States of this Union shall be obliged to suffer an importation into such States of a statutory right having no existence except in Kansas or by virtue of a Kansas statute, and require such States to enforce that right unknown to their own laws, unknown to the common law, and repugnant to the policy of the States for and during a period of years after said statutory right was

extinguished by the laws of Kansas, and to enforce this deceased Kansas right of action during whatever period of years the general statutes of the State into which the Kansas right of action is sought to be imported might suffer remedies to exist in common-law cases which may happen to be most analogous to this statutory right, as, for instance, injuries to the rights of others not founded on contract.

On this point we rely upon what was read from Story's Conflict of Laws, section 582, page 801, of which the following is a part:

"Suppose, for instance (as has occurred), that personal property is adversely held in a State for a period beyond that prescribed by the laws of that State, and after that period has elapsed the possessor should remove into another State which has a longer period of prescription or is without any prescription, could the original owner assert a title there against the possessor, whose title, by the local law and the lapse of time, had become final and conclusive before the removal? It has certainly been thought that in such a case the title of the possessor cannot be impugned. If it cannot, the next inquiry is whether the bar of a statute extinguishment of a debt *lege loci* ought not equally to be held a peremptory exception in every other country. This subject may be deemed by some persons still open for future discussion. It has, however, the direct authority of the Supreme Court of the United States in its favor."

The case in this Court here referred to is *Selby vs. Guy* (11 Wheat., 361), where the head-note states as follows:

"Five years' *bona fide* possession of a slave constitutes a title by the laws of Virginia, upon which the possessor may recover in detinue, and this title may be set up by the vendee of such possessor in the courts of Tennessee as a defense to a suit brought by a third party in those courts."

III.

In regard to the point that the courts will not inflict upon the States of this Union the policies and provisions of statutes of other States that are not in harmony with the statutes

and policies of the State of the *forum*, the statement quoted from this Court (at the bottom of page 10 of our additional brief) from the case of *Railroad Co. vs. Cox* (145 U. S., 593) is surely precisely the equivalent of a statement asserting that if the cause of action founded upon the statute of one State is sought to be enforced in another, and is *inconsistent* with the statutes or with the public policy of such other State of the *forum*, then it will not be enforced in the latter State.

We therefore thus have the direct authority of this Court that if the public policy of Missouri is hostile to the policy affirmed by this Kansas statute, then the Kansas statute *cannot* be imported into Missouri.

It is proper here to especially fix in the attention of the Court that in every case where a State has suffered a right of action created by a different State to be enforced in the former State, there the Court has been careful to note and to remark upon the fact that in the State of the *forum*, enforcing the foreign law, a substantially similar remedy and liability are provided for by the laws of the State of the *forum*, this being noted and affirmed, not in basing the action on the similar statute in force in the State of the *forum*, but being pointed to as showing that the importation of the foreign statute was in harmony with the public policy of the State enforcing the foreign statute.

Take, for example, the case of *Railroad vs. Cox* (145 U. S., 605). In that case it was contended that the statute of Louisiana, under which the action was brought, was dissimilar to the statute of the State of the *forum* (Texas). The court stated:

"The statutes of these two States on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the State of Texas."

The case of *Bank of Augusta vs. Earle* (13 Pet., 519), quoted yesterday, is one which was most elaborately argued by such lawyers as Mr. Sargeant, Mr. Webster, Mr. Ingersoll, and other counsel of supreme eminence, and was exhaustively considered by Chief Justice Taney in his opinion beginning at the bottom of page 584. Moreover, this case has stood unchallenged ever since its decision in 1839, and is now the settled law of this Court upon the points embraced in the decision.

We therefore here repeat our citation of what that case carefully decides. Take, for example, the last paragraph of the head-note, on page 520, where what is found in the opinion of the Chief Justice is thus condensedly stated :

"When the policy of a State is manifest the courts of the United States would be bound to notice it as part of its code of laws, and to declare all contracts in the State repugnant to it to be illegal and void."

What we have quoted on pages 12 and 13 of our additional brief shows that this case establishes the proposition quoted at the bottom of page 12 of said additional brief, which asserts that the introduction of a foreign law into one of the States is inadmissible when contrary to the policy or prejudicial to its interests.

This, therefore, is a complete refutation of the position of Mr. Phillips, that it is only when the policy sought to be introduced into another State by importation is immoral that the importation will be prohibited.

On the contrary, this authority asserts that the importation will be prohibited whenever it is manifest that either the interest or the public policy of the State, where the foreign law is sought to be enforced, forbids the importation.

I have looked through the decisions in Missouri and have found that what is stated in *McGowan vs. Railroad* (61 Mo., 532), and going to the extent of holding that "*prima facie*

all servants of a common master employed in running or operating and rendering service with trains of cars are fellow-servants" within the technical meaning of these words, and that damages from the negligence of such fellow-servants to another employé cannot be recovered by the laws of Missouri, is a rule, principle, and policy characterizing and running through the entire body of the adjudications of the supreme court of that State, and, so far as I could find, there is, in the history of that court, no exception or dissent.

It is, therefore, true of the public policy of Missouri on this very important principle of public policy and law that that policy is manifest, and therefore is within the rule laid down in the last paragraph which is above quoted in the head-note to said case of *Bank of Augusta vs. Earl* (13 Pet., 520).

See the same thing as to not importing into a State foreign laws which are inconsistent with the interests of such State. (*R. R. Co. vs. Babcock*, 154 U. S., 197, 198.)

IV.

In conclusion it is proper to state in reply to the question asked by Mr. Justice Shiras as to whether it was a fact that the present Kansas statute creating said liability had been enforced by the highest court in Missouri, and suggesting that Mr. Phillips, in his argument, had referred to such a case, that we have, since the conclusion of the argument in this case, asked Mr. Phillips whether he had cited or referred to such a case, and he replied that he had not, and he knew of no such case. We know of no such case, and have been unable to find any recognition or enforcement by the courts in Missouri of said Kansas statute.

SAMUEL SHELLABARGER,
For Plaintiff in Error.

MAR 29 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 217.

UNION PACIFIC RAILWAY

vs.

OTTO WYLER.

Statement of Facts and Brief of Counsel for Defendant in Error.

THOS. P. FENLON,
J. W. JENKINS,
W. C. WELLS,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

No. 217.

UNION PACIFIC RAILWAY

vs.

OTTO WYLER.

Statement of Facts and Brief of Counsel for Defendant in Error.

Otto Wyler, the defendant in error, was a boiler-maker by trade and was in the employment of the Union Pacific Railway Company on the 23d day of April, 1883, and had been for some time previous thereto. At the time last named his business was to repair engines in and about the round-house at Armstrong, Kansas, for said company. On the day named an engine of said company was placed over a pit at the said round-house for repairs, and Wyler, with an assistant named Kline, who was also an employé of the company at the round-house, were instructed to make some repairs on said engine. This repairing required both Kline and Wyler to get into the pit under the engine.

This pit was about four feet deep, and both Kline and Wyler were about five feet and ten inches high. In order to get at the repairs to be made, Wyler and Kline had to take out the grate, which weighed about one hundred and fifty pounds. After the repairs had been made the two men lifted the grate from the ground in the pit where it had lain while the repairs were being made and were in the act of placing it where it belonged, both having it on their shoulders with their backs toward each other, when Kline struck his head against the engine, and in a fit of anger threw down his end of the grate and ran out of the pit, swearing as he went. The falling grate jerked Wyler down to the bottom of the pit and permanently injured him. The injury received was an aneurism of the descending aorta, which completely disabled him for life. He was at that time 38 years of age, had always been stout and strong, had served a regular apprenticeship at his trade in Switzerland, and since 1861 had worked at his said calling.

At the time of the injury he was receiving two dollars and seventy-five cents a day for his services. He did not know for some length of time after the accident the extent of his injuries. He spent about $900 for physicians' fees and medicines trying to get relief and was finally informed that his injuries were incurable. On the 23d day of October, 1886, he brought suit against the said railway for twenty-five thousand dollars damages in the circuit court of Jackson county, Missouri, which cause was removed to the circuit court of the United States, sitting in and for the western division of the western district of said State, on the petition of the railway company. After the cause was docketed in the United States circuit court, and on the 18th day of November, 1886, the Union Pacific Railway Company filed an amended answer, setting up, 1st, a general denial; 2d, contributory negligence; and 3d, the statute of limitations of the State of Kansas.

To this plea, which will be found on page 12 of the

printed record, a demurrer was interposed. On the 23d day of January, 1888, the defendant filed another amended answer, in which its third defense was a plea of the statute of limitations of the State of Kansas, stated a little more fully, and it will be found on page 14 of the Record. A demurrer to this plea was interposed, submitted to his honor Judge Brewer, and by him sustained, and not excepted to. On the 30th of October, 1888, plaintiff, Wyler, filed an amended petition, and again on the 2d of November, 1888, by consent of all parties, the plaintiff filed another amended petition. This will be found on page 16 of the printed record. On the 3d of November, 1888, the defendant railway company filed an answer to the amended petition, and on the 5th day of March the company filed an amended answer to the amended petition. The same day a demurrer was filed to the third defense set up in the answer to the amended petition, and it was by the court sustained. This cause of defense so demurred to was the statute of limitations of the State of Kansas. No demurrer or reply was ever made to the amended answer to the amended petition, and the case went to trial without the issues being made on the points raised by the amended answer to the amended petition. On a trial before a jury a verdict was rendered for $10,000 and judgment was rendered for said sum. To reverse this judgment the case is brought here by writ of error.

BRIEF.

We have not, at the time of the preparation of this brief, had an opportunity of seeing the printed argument of the plaintiff in error and cannot answer it specifically, but we will have to be content with taking certain of the assignments of error and discussing each in the order named.

I.

It is complained that the court erred in permitting plaintiff to amend his petition by changing the cause of action therein stated and introducing a new and entirely different cause of action. For reasons that we will proceed to state, we do not think that this contention can be maintained :

1st. It will be seen on page 18 of the Record that the second amended petition was filed on the 2d day of November, A. D. 1888, by consent of all parties. It will scarcely need an argument or authority to support the proposition that when a party has deliberately and in open court consented to the filing of a document, an error cannot be predicated thereon ; and yet that is what is contended for on this point.

2d. In order to sustain this alleged error, if it could be done at all, not only must there be no consent to the filing, but objection must be made at the time it is done. In the case of Chirac *et al. vs.* Reinicker, 11th Wheat., 303, this Court on this subject used the following language :

" In the present case, as no objection was taken to the amendment upon the record, it must be deemed to have been waived by the defendant and thereafter not proper to be insisted upon at the trial."

3d. This assigned error cannot be sustained for another reason. Amendments to pleadings are allowable by the statute of the United States (see Rev. Stat. U. S., sec. 954), and it has been held universally by this Court, from the time the opinion in the case of Mandeville *vs.* Wilson, 5 Cranch, 15, was delivered down to this time, that amendments are discretionary with the courts below and are not subjects of review by this Court.

See—

Chapman *vs.* Barney, 129 U. S., 677.
Sheehy *vs.* Mandeville, 6 Cranch, 255.
Walldon *vs.* Craig, 9 Wheat., 576.
Chirac *vs.* Reinicker, 11th Wheat., 280 and 302.
Weight *vs.* Hollingworth, 1 Pet., 165.
U. S. *vs.* Buford, 3 Pet., 12.
Murphy *vs.* Stewart, 2 How., 263.
Ex parte Bradstreet, 7 Pet., 634.

4th. Our fourth and last reason as to why this assignment of error is not to be sustained is this: It is alleged that the amended petition on which the case was tried stated a different cause of action from that alleged in the original petition, and for that reason ought not to have been permitted. We deny that the cause of action was changed. The Court will perceive that the two petitions give the same defendant; the same plaintiff asks for the same damages and for identically the same injury, incurred at the same time. In the original petition it is alleged that the defendant was injured by the negligence of the servant of the defendant and his employé, and the particular negligence specified was in keeping the incompetent employé by whose negligent act plaintiff was injured.

In the amended petition it is more particularly stated that the injury was the result of the negligent act of the same employé. A corporation can be guilty of no negligent act except those of its agents or employés, from the very

nature of its being. The first petition alleges that the injury was caused by the negligent act of the company, and the next goes further and states its specific act of negligence which caused the injury. No new claim is asserted, and it seems to us it is a wonderful strain of imagination to call this another and different cause of action. On this question we are not left alone to the reason of the thing and are not without authority. In the case of Salmon *vs.* Pacific R. R. Co:, 14 Kan., 512, it was held that the change of an allegation in a petition from a passenger to an employé did not change the cause of action. In that case, the first petition charged that Daniel Salmon, being a passenger on the defendant's line of defendant's road, was by the negligence of the company killed. The amended petition charged that he, being an employé of the company, was by its negligence killed, and the court held in that case that there was no change of a cause of action, and uses the following language (p. 525):

"The fact of Salmon's being a passenger or employé is not the cause of action or the foundation for the cause of action. Negligence of the company, whereby the injury occurred, may more properly be termed the foundation of the cause of action. The fact of Salmon being a passenger or an employé was simply one of the facts which entered into the description of the cause of action. It is, of course, a material fact. The allegation in the petition which sets it forth is a material allegation, but section 139 of the code authorizes a pleading to be amended by inserting other allegations material to the cause. * * * But if the amendment does not change the cause of action from one thing to another, we think this may be made. Amendments may be made where the amendments are merely of facts descriptive of the cause of action and do not change the cause of action from one thing to another."

Also see—

12 Kan., 447–449.
14 Ohio State, 213.
23 Penn. State, 290.

So we conclude on this branch of the case that the Court must hold that there was no new cause of action begun when the amended petition was filed.

5th. We have contended that this was not a new cause of action, but the same cause as that stated in the original petition. But we are not without authority for the position that if it was the same thing, the same parties, and for the same injury the cause of action could be changed and yet it would not be error.

See—

Chapman *vs.* Webb, 6 How. Pr., 390.
The Troy & Boston R. R. Co. *vs.* Tibbetts, 11th How. Pr., 168.
Eighmie *vs.* Taylor, 39 Hun., 366.

Second Assignment of Error.

We come now to consider the second assignment of error, which is in these words:

"The court erred in sustaining plaintiff's demurrer to the third paragraph of defendant's amended answer, which answer was filed March 5, 1889."

The Court will perceive that there was no demurrer filed to the third paragraph of defendant's amended answer. The demurrer which was filed was to the *answer* to the amended petition, and it will be found on page 22 of the printed record and is in these words:

"And now comes the said plaintiff and demurs to the third ground of defense in the answer to the amended petition herein."

And this Court will further perceive that the court below recognized it as a *demurrer to the answer* and not *to the amended answer* from the very wording of the judgment on

this demurrer. It will be found on page 23 of the printed record and is in these words: "The demurrer to the *answer* (not *amended answer*) in the above cause having been submitted to the court and taken under advisement, it is now ordered that the same be sustained." The third defense in the amended answer is that of contributory negligence, and no tyro in the law would have demurred to that. The statement in the assignment of error, "which answer was filed March 5, 1889," does not change the fact disclosed by the record that there was no demurrer to the answer filed March 5, 1889, which was the amended answer. The case went to trial without any reply or demurrer to the amended answer to the amended petition, as the Record, on pages 19 to 23, will show. This irregularity is cured by the trial and verdict of the jury.

Laber *vs.* Cooper, 7 Wall., 565.
Nauvee *vs.* Ritter, 97 U. S., 7 Otto, 389.
Nat. B'k *vs.* Life Ins. Co., 104 U. S., 14 Otto, p. 77.
Erskine *vs.* Hohnback, 14 Wall., 613.

The demurrer to the defense in the answer, which will be found at the top of page 20 and which was filed November 3, 1888, raised the question of whether or not the statutes of limitations of Kansas extinguished plaintiff's right of action so that a suit could not be maintained thereon in the circuit court of the United States sitting in Missouri.

And while we do not think this question is fairly raised by the second assignment of error, yet it was certainly passed on in the decision of Judge Caldwell on the motion for a new trial, and we will therefore discuss it. The Court will find Judge Caldwell's opinion on this subject on page 77 of the Record, and for its convenience we will here copy it:

"The grounds chiefly relied on for a new trial are that the plaintiff's action was barred and the cause of action itself extinguished. The contention is that the action can-

not be maintained in the State of Missouri, because the right of action was given by a statute of Kansas, and that the cause of action just given by the statutes of that State was barred by the statutes of limitations of that State before the action was brought in this State. Upon looking into the record I find these questions were raised by demurrer and decided by Circuit Judge, now Justice, Brewer and Judge Phillips. This case has been tried three times, once before Judge Brewer, once before Judge Phillips, and lastly before myself. In the first two trials the juries failed to agree. On each of the former trials the presiding judge must necessarily have ruled upon the question of law raised by this motion and must have ruled adversely to the defendant; otherwise there would have been a verdict for the defendant. In view of all these rulings I am inclined to regard these questions as *res adjudicata* in this case. I think for the purposes of this case at least I ought to accept the ruling of Judge, now Justice, Brewer and Judge Phillips on the demurrer and on the two previous trials of this case as settling the law for this case."

We will state the point as we understand it and then proceed to discuss it. At the time this suit was instituted in the circuit court of Jackson county, Missouri, it was barred by the statutes of limitations of the State of Kansas. The statute of Kansas as to the effect of a bar of the statute of limitation is in these words: "When a right of action is barred by the provisions of any statute it shall be unavailable either as a cause of action or ground of defense." The question arises, does this statute obliterate the right or does it simply operate on the remedy? Is the remedy only extinguished in Kansas or is the right also extinguished?

Ever since the case of McElmoyle *vs.* Cohen, 13 Peters, 312, and down to this time, the law has been uniform that the *lex fori*, and not the *lex loci contractus*, governs in the trial of all cases in the Federal courts.

See—

Townsend *vs.* Jamison, 9 How., 407.
Hanger *vs.* Abbott, 6 Wall., 532.

Campbell *vs.* Holt, 115 U. S., 620.
The Mich. Ins. B'k *vs.* Eldred, 130 U. S., 693.
Walsh *vs.* Mayer, 111 U. S., 31.
Bacon *vs.* Howard, 20 Howard, 22.
The Bank of Ala. *vs.* Dalton, 9 Howard, 522.
Amy *vs.* Dobuque, 98 U. S., 8 Otto, 470.
Hawkins *vs.* Barney, 5 Peters, 457.
Duson *vs.* Ramsey, 3 Cranch, 319.
Bank *vs.* Donally, 8 Peters, 361.
Wilcox *vs.* Hunt, 13 Peters, 378.
Pritchard *vs.* Norton, 106 U. S., 127.

We need not deny the proposition that if the statute of Kansas operated to extinguish Wyler's right as well as the remedy, then he has no cause of action; that where the right is extinguished by the statute laws of the State where the right accrued, whether by statutes of limitation or not, then there is no right of action in another State.

The exceptions to the foregoing general rule are these:

First. When the statute laws of the State where the trial is being had provide that where an action is barred by the limitation laws of the State where it accrued, it shall not be a cause of action in such State where the trial is sought to be had.

To dispose of this exception we simply state that the statute laws of Missouri contain no such provision.

Second. When the cause of action accrued in a foreign State and arises by virtue of a statute of such foreign State, which statute itself provides the time within which the newly created right shall be exercised, and provides, further, that such newly created right shall cease to exist at the expiration of such time, then such cause of action cannot be availed of after such time has passed, either in the home State or in any foreign State. It will not be contended

that this exception covers our case, for the right to sue a railroad for the negligent act of the co-employé is a statutory one in Kansas and there is nothing in the act itself which pretends to limit the time within which the cause of action must be exercised, and the only limitation to the cause of action is that which is provided in the general statute of limitations on the subject.

The P., C. & St. L. R. R. *vs.* Hine, 25 Ohio St., 629.

The courts draw a distinction between those statutes which create a right of action, also limit the time of its exercise as a part and parcel of the right, and those statutory rights of action which are only operated on as to time by the general statute of limitation.

The former cannot avail in a foreign State after the time expires; while the latter case can be enforced in another State if not barred by the statute of limitations of that State. We respectfully submit that these authorities sustain our view of this case, that the statutes of limitation in Missouri alone are applicable to our case and it is not barred by the statutes of limitations of Kansas.

Third. The third exception to the general rule that the *lex fori* alone governs in such actions as these is this: Where there is a provision of the statute of the State where the action accrued that her statutes of limitations shall extinguish the right as well as bar the remedy. The following are some of the cases which throw light on this point:

Townsend *vs.* Jamison, 9 How., 407.
Baker *vs.* Stonebraker, 36 Mo., 338.
Carson *vs.* Hunter, 46 Mo., 467.
McMerty *vs.* Morrison, 62 Mo., 143.
Haggett *vs.* Emerson, 8 Kan., 264.
Canadian Pac. R. R. *vs.* Johnston, 9 U. S. Ct. Ap., 594.
Perkins *vs.* Guy, 55 Miss., 153.

The case of Baker *vs.* Stonebraker, 36 Mo., 338, was where there was a suit on a judgment rendered in Maryland, and which by the statutes of that State was not only barred, but extinguished. The supreme court of Missouri, in a well-considered opinion, say as follows:

"The doctrine is well established that where an act of this kind operated to extinguish the contract or debt itself the case no longer falls within the law of limitation on the remedy merely." "In such case, when the debt or judgment is sued on in another State, the *lex loci contractus*, and not the *lex fori*, governs," citing Story on Conflict of Laws, sec. 582; Huber *vs.* Steiner, 2 Bing. N. N., 202.

The case of Carson *vs.* Hunter, 46 Mo., 467, briefly stated is this: Carson brought an action on a promissory note made in Arkansas, where the limitation is five years, while in Missouri it is ten. The court says:

"The *lex fori* decides all questions pertaining to remedy." * * * "It is too well settled now to admit of question that acts of limitation, unless they *expressly discharge the debt*, go merely to the remedy, and that none can be pleaded except those in force where the suit is brought."

The case of McMerty *vs.* Morrison, 62 Mo., 143, on the same point and in a similar case, says as follows:

"But where the statute of limitations where the contract is made operates to extinguish the contract or debt itself the case no longer falls within the law in respect to the limitation of the remedy; and when such a contract is sued on in another State the *lex loci contractus*, and not *lex fori*, is to govern," and cites Baker *vs.* Stonebraker, 36 Mo., 338; Shelby *vs.* Grey, 11 Wheat., 361.

In the case of Haggett *vs.* Emerson, 8 Kan. Rep., 264, the question of the effect that foreign statutes of limitation would have on a case being tried in Kansas, Judge Brewer uses the following language:

"The laws of Illinois have no extraterritorial force." "Statutes of limitation affect the remedy and form no part of the contract. The laws of the forum determine the remedy. We must look to the laws of the State to determine whether the action was barred."

This Court, in the case of Townsend *vs.* Jamison, *supra*, uses the following language:

"It is the rule in all cases where it is declared by statute that all rights to debts due more than a prescribed term of years shall be deemed extinguished, and that all title to real and personal property not pressed within the prescribed time shall give ownership to an adverse possessor. Such a law, though one of limitation, goes directly to the extinguishment of the debt, claim, or right, and is not a bar to the remedy."

We come now to consider the question as to whether or not this case comes within the third exception to the rule, that the *lex fori* governs as to the statute of limitations. The effort was made in the court below to plead a certain section of the statutes of Kansas, numbered 25, in the chapter on limitations of actions and which is in these words:

"When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or as a ground of defense."

This statute will be found in the General Statutes of Kansas of 1889, vol. 2, and numbered therein section 4102. It was gravely argued in the court below that this section of the statute of Kansas operated to extinguish the right as well as the remedy. The section has been a part of the law of Kansas ever since it has been a State, and, so far as the decided cases show, no counsel has ever before its supreme court taken the position that this statute meant to extinguish the right as well as the remedy.

Our contention on this point is that this section simply meant to say that the statute of limitation as given in the

previous parts of that chapter was to apply to set-offs as well as to actions. If we are not right in this, then there is no section of the statute of limitation of Kansas which is applicable to set-offs or counter-claims, for there is no other section of the laws of Kansas which makes her limitation statute applicable to counter-claims. Every other State in the Union whose statutes we have examined, and we have examined very many of them, have a clause or provision making the limitation laws a defense to counter-claims. We think this is a cogent reason why this construction should be placed on this statute. Again, the very wording of the statute itself negatives the idea that it meant to extinguish the right. It says that when the action is barred it shall not be available as a cause of action. The construction sought to be placed on the word unavailable is to make it mean extinguish or obliterate. To extinguish a right of action would be to make it cease to exist, and if the right ceases to exist, of course it would be unavailable. So it would be unavailable if the courts would not sustain it, because it was barred. If the cause of action be extinguished it would be unavailable, and so if it was barred it would be unavailable. If the legislature meant to go so far as to say that the cause of action would be extinguished they would have used apt words to express their meaning. The use generally made of statutes of limitation is simply to act on the remedy and not affect the right. We repeat that if the law-making power intended to go farther than usual and make the limitation acts obliterate the right as well as bar the remedy, they would, as other States have done, said so in plain and unequivocal language. It will be observed that this statute is made applicable to all the different sections of the limitation laws of Kansas; so if the construction be placed on this statute now contended for by opposing counsel, it follows that these statutes, each one as it occurs, obliterate the right as well as bar the remedy, and the supreme court of Kansas in construing each one of

them would be bound to rule that said statute does not operate on the remedy merely, but extinguishes the right. We find, however, on examining all the adjudicated cases on the subject of limitation, the supreme court of that State has uniformly held that her statutes of limitation operate on the remedy only. Of the many cases construing the statutes of limitation of Kansas we cite the following:

Andrews *vs.* Morse, 51 Kan., 32.
Rice *vs.* Moore, 48 Kan., 591.
Sibert *vs.* Wilder, 16 Kan., 161.
Kennedy *vs.* Powell, 34 Kan., 22.
Ryus *vs.* Grubel, 31 Kan., 770.
Robbins *vs.* Sackit, 23 Kan., 305.
Keith *vs.* Keith, 26 Kan., 40.
Haggett *vs.* Emerson, 8 Kan., 264.
Swickart *vs.* Bailey, 3 Kan., 511.
Bowman *vs.* Cockrell, 6 Kan., 338.
Taylor *vs.* Miles, 5 Kan., 515.
Schmucker *vs.* Sibert, 18 Kan., 104.

The case of Andrews *vs.* Morse, 51 Kan., 32, was where a mortgage creditor failed to probate his claim against the estate of a decedent within the time required by law. It was contended that this extinguished the mortgage which secured the claim, and that therefore no foreclosure could be had. But the Court held that notwithstanding his failure to probate his claim, yet he could foreclose his mortgage and subject the property to the payment of the debt, thus holding that the limitation act simply applied to the remedy.

In the case of Rice *vs.* Moore, 48 Kan., 591, the court held that remedies are to be governed by the laws of the country where the suit is brought, "the law of this State, where the action is brought, must govern the limitation," thus again holding that the limitation act of Kansas operates upon the remedy.

previous parts of that chapter was to apply to set-offs as well as to actions. If we are not right in this, then there is no section of the statute of limitation of Kansas which is applicable to set-offs or counter-claims, for there is no other section of the laws of Kansas which makes her limitation statute applicable to counter-claims. Every other State in the Union whose statutes we have examined, and we have examined very many of them, have a clause or provision making the limitation laws a defense to counter-claims. We think this is a cogent reason why this construction should be placed on this statute. Again, the very wording of the statute itself negatives the idea that it meant to extinguish the right. It says that when the action is barred it shall not be available as a cause of action. The construction sought to be placed on the word unavailable is to make it mean extinguish or obliterate. To extinguish a right of action would be to make it cease to exist, and if the right ceases to exist, of course it would be unavailable. So it would be unavailable if the courts would not sustain it, because it was barred. If the cause of action be extinguished it would be unavailable, and so if it was barred it would be unavailable. If the legislature meant to go so far as to say that the cause of action would be extinguished they would have used apt words to express their meaning. The use generally made of statutes of limitation is simply to act on the remedy and not affect the right. We repeat that if the law-making power intended to go farther than usual and make the limitation acts obliterate the right as well as bar the remedy, they would, as other States have done, said so in plain and unequivocal language. It will be observed that this statute is made applicable to all the different sections of the limitation laws of Kansas; so if the construction be placed on this statute now contended for by opposing counsel, it follows that these statutes, each one as it occurs, obliterate the right as well as bar the remedy, and the supreme court of Kansas in construing each one of

them would be bound to rule that said statute does not operate on the remedy merely, but extinguishes the right. We find, however, on examining all the adjudicated cases on the subject of limitation, the supreme court of that State has uniformly held that her statutes of limitation operate on the remedy only. Of the many cases construing the statutes of limitation of Kansas we cite the following:

Andrews *vs.* Morse, 51 Kan., 32.
Rice *vs.* Moore, 48 Kan., 591.
Sibert *vs.* Wilder, 16 Kan., 161.
Kennedy *vs.* Powell, 34 Kan., 22.
Ryus *vs.* Grubel, 31 Kan., 770.
Robbins *vs.* Sackit, 23 Kan., 305.
Keith *vs.* Keith, 26 Kan., 40.
Haggett *vs.* Emerson, 8 Kan., 264.
Swickart *vs.* Bailey, 3 Kan., 511.
Bowman *vs.* Cockrell, 6 Kan., 338.
Taylor *vs.* Miles, 5 Kan., 515.
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payment on the debt by the debtor would revive the cause of action.

In the case of Swickard *vs.* Baily, 3 Kan., 511, the court says: "Acts of limitation are laws of the forum applying to the remedy. They can have no extraterritorial effect." It seems to us clear that this decision is decisive of the case at bar. The question of the construction of statutes is clearly left to the supreme court of the State where the statute exists. Here the supreme court of Kansas has in plain and unequivocal terms said that her statute of limitation could not be pleaded in bar of an action in another State. This she could not have said if the statute of limitation of Kansas extinguished the right as well as the remedy.

We have thus given the substance of a number of cases from the supreme court of Kansas, and it has uniformly held that the limitation acts of that State operate upon the remedy merely, and that our contention as to the proper construction to be put on said section 25 is the proper one, to wit, that all that it meant was to give the right to apply the statutes to an offset or counter-claim as well as to an action. We have done so at length because practically this was the only defense set up and gravely urged in the court below, but do not admit, save for the purpose of meeting every conceivable phase of this case, that this question of limitation can be raised in this court.

The only case which we have been able to find which decides contrary to our contention is the case of Finnell *vs.* Southern Kansas Railroad Company, reported in the 33 Fed. Rep., p. 427, in which Judge Thayer uses the following language: "That in my judgment section 25 of the limitation acts of Kansas was intended to extinguish a cause of action after the lapse of the statutory period of limitation and not merely to bar the remedy." This decision was cited and relied on by opposing counsel in the court below, and Judges Brewer, Phillips, and Caldwell refused on three

different occasions in this case to follow it. Manifestly, this case is not supported by sound reason and is opposed by the vast mass of authority on this subject.

This second assignment of error by its very terms refers to a ruling of the court which was never made, to wit, the sustaining of plaintiff's demurrer to the third paragraph of defendant's amended answer. There was no demurrer to the amended answer to the amended petition, as the record shows, but only a demurrer to the answer to the amended petition. As the case went to trial on the amended petition and the amended answer, with only a reply to the second ground of defense, there could be no error predicated on the sustaining of the demurrer to prior pleadings. See Ferguson *vs.* Meredith, 1st Wallace, 25, where the court says as follows: "When the plaintiff replied *de novo*, after demurrer was sustained to his original replication, he waived any right he might have had to question the correctness of the decision of the court on the demurrer."

The amended answer sets up as its fourth cause of defense the same defense as to the third set up in the answer. If the plaintiff saw proper to let that defense go in without response or demurrer, then the defendant cannot complain.

But if the court should determine that the demurrer filed March 5, 1889 (p. 21 of the Record), was intended as a demurrer to the amended answer, then the word "*third*" ground of defense was clearly a clerical error and should have stated the *fourth* ground, for all other parts of the record, including Judge Caldwell's written opinion, show that the limitation defense was the main one contested and decided. The third defense in the amended answer is that of contributory negligence, which was a proper defense, and no one would have demurred to that and no judge would sustain it.

We respectfully submit that there is nothing in this assignment of error.

THIRD ASSIGNMENT OF ERROR.

We come now to consider the third assignment of error. It is to some remarks made by the trial court while the plaintiff Wyler was being cross-examined by the counsel for the railway. Counsel sought to impeach the witness by asking him as to his testimony on a former occasion. The witness had some little acquaintance with the English language. He was testifying through an interpreter. It seems that shortly after he received his injuries his wife, with the assistance of the man Kline, had written in German how they understood the accident occurred and had Wyler, the plaintiff, to sign it. If the Court cares to read this statement it will be found on page 69 of the Record. Counsel for the railroad sought to attack the witness by asking him if on a former trial of the cause he had not stated that he himself wrote the document. As the witness was examined and testifying under great disadvantage, the court sought to have the testimony accurately brought out. During this examination by the court it, the court, remarked: "I do not attach much importance to the point you are trying to make; it is perfectly obvious that the witness never did say this. I will leave this to the jury, however." The exception reserved at that time is as follows: "I shall be obliged specially at this time to except to the remarks of your honor upon the interpretation to be given in regard to what the witness meant."

Just what meaning is to be given to this exception we are free to say we do not know. There is absolutely nothing in the remarks of the trial judge which indicates anything as to the interpretation he held in regard as to what the witness meant. There is nothing in the remarks of the judge about what the witness meant, and we therefore conclude that there is nothing serious in the assignment of error.

It appears to us that no wrong to the plaintiff in error can be predicated on what the judge said then.

FOURTH ASSIGNMENT.

The fourth assignment of error is to the rejection of certain testimony of the plaintiff on the cross-examination. The Court will find on page 49 of the Record the testimony complained of. It will be seen that the defendant did not except to the ruling of the court at that time, but simply objected to it; but if we consider it as properly excepted to we are clearly of the opinion that there is nothing in this assigned error. The testimony was not in the cross-examination of anything brought out in the direct examination and was totally and wholly irrelevant and immaterial. See on this point—

Houghton *vs.* Jones, 1st Wall., 371.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR.

At the close of plaintiff's testimony the defendant asked the court to order the jury to find for the defendant, which the court refused to do, and this is assigned as error. The sixth assignment of error raises also the same question, because practically the defendant had no testimony and at its close he asked the same instruction. We will therefore discuss these two assignments together. It will not be contended, we apprehend, that the testimony did not make out a case against the railroad. It shows that the plaintiff Wyler was permanently injured by the act complained of, to wit, the negligence of Kline, his co-employé, in throwing down the grate which jerked Wyler down to the ground. There is no testimony in the case which casts the least shadow of doubt as to the extent of and permanency of the injury. The court appointed two of the most distinguished surgeons in Kansas City to examine him, along with the surgeons who had for years been treating him, and the three agreed unanimously that the descending aorta was

statutes would control this Court, which is in conflict with the said statute of the State of Kansas. We respectfully submit that these assignments of error—the fifth and sixth—are not well taken and should not be sustained by this Court.

U. S. *vs.* Buford, 3 Peters, 12.
Ex parte Bradstreet, 7 Pet., 634.

In conclusion, we respectfully submit that there is nothing of error in this case and the judgment should be affirmed.

Thos. P. Fenlon,
J. W. Jenkins,
W. C. Wells,
For Defendant in Error.

158-285

Office Supreme Court, U. S.
FILED.
MAR 29 1895
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CLERK.

Supreme Court of the United States.

No. 217.

UNION PACIFIC RAILWAY COMPANY

vs.

OTTO WYLER.

BRIEF OF W. HALLETT PHILLIPS, FOR DEFENDANT IN ERROR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

No. 217.

UNION PACIFIC RAILWAY COMPANY

vs.

OTTO WYLER.

BRIEF OF W. HALLETT PHILLIPS, FOR DEFENDANT IN ERROR.

This action was brought by Wyler in a State court of Missouri for injuries sustained by him owing to the negligence of the company while in its employ and while engaged in his occupation of repairing a locomotive in the State of Kansas, where a portion of defendant's road is located.

The suit was removed by the company into the United States circuit court for the western district of Missouri.

The principal defense was a plea of the statute of limitations. This was overruled, and, issue having been joined on the merits involving the question of negligence, there was a verdict and judgment in favor of plaintiff. Defendant prosecuted a writ of error.

The question of limitation is presented in two aspects—

As regards the statute of Kansas, where the cause of action arose.

As regards the statute of Missouri, where the action was prosecuted.

When the suit was instituted it was barred by the statute of Kansas, but it was in time by the law of Missouri.

Plaintiff in error seeks to apply the Kansas limitation in the court in Missouri, on the ground, that the liability which the plaintiff below enforced against the company for an injury growing out of the carelessness of a fellow-servant, was granted by Kansas law, and that the general Kansas statutes of limitations should control as to the right of action sought to be enforced in the United States court in the State of Missouri.

It is also said that if the limitation acts of Kansas do not apply, the action must fail because not really prosecuted until an amended petition was filed which stated a new cause of action, and that such amended petition was filed too late under the law of Missouri.

It will thus be seen that the plaintiff in error relies in this case upon the statute of limitations of Kansas, and also maintains that the statute of Missouri bars the action.

It is further claimed that this action being brought under the Kansas statute, which prescribes the liability, it can only be sustained in the courts of Kansas.

The original petition, it is contended by the company, alleged as the cause of action the negligence of Kline, the employé whose carelessness caused the injury, and asserted as the ground of the liability the retaining of Kline after his incompetence was known to the company.

That in the amended petition the latter allegation was dropped and the liability placed on the statute of Kansas which is set forth in the amended petition and is as follows:

"Every railroad company organized or doing business in this State shall be liable for all damages done to any em-

ployé of such company in this State in consequence of any negligence of its agents or by any mismanagement of its engineers or other employés to any person sustaining such damage." (R., p. 18.)

Defendant in error submits that the defense of the company is not sustainable.

The cause of action was the negligence of the company acting by its employé, Kline, resulting in the injury.

The only change by the amended petition is the special reference to the Kansas law. As by that statute the company is made liable by the mere fact of the carelessness of its servant, resulting in the injury, there was no need of retaining an allegation which stated the additional fact of the negligence of the company in retaining the incompetent servant.

No new cause of action was alleged in the amended petition. It cannot be considered as a new suit. The reference to the statute of Kansas did not make a new cause of action, but only particularly set forth the grounds upon which liability was sought to be established. X

If that statute had not been cited it would not have been contended that the cause of action had been changed. Had the company defended on the ground of fellow-service would it not have been an answer to have produced the Kansas statute?

It cannot properly be said there was no "cause of action" against the defendant independent of the Kansas statute. Under many circumstances a master is liable to a servant for the negligence of a fellow-servant: thus, if the master does not provide suitable service or suitable means of conducting that service.

The fact that the injury was directly brought about by a fellow-servant did not of itself show there was no cause of action against the company.

Whether the company was exempt from liability by that

X Chamberlain vs. Mensing, 51 Fed.Rep. 511,
Smith vs. Mo. Pac. Ry. 56 do. 458,
Atlantic & Pac.Ry. vs. Laird 58 Fed.Rep. 760.

fact was a matter of defense which could only be determined on trial when all the circumstances would be developed.

The case differs from one where suit is brought for damages resulting from death; there the cause of action is purely statutory.

As the cause of action arose in Kansas, it was governed by the law of that State so far as the right was affected. The statement of that law in the petition was not essential. If it had not been stated it could have been produced in evidence or by other proper way.

That the cause of action was regulated by the law of the place where the injury was suffered was recognized by the defendant. Its defense to the original petition was the statute of limitations of Kansas. The mistake made was in supposing that the *remedy* as well as the *right* was controlled by the law of Kansas.

Even if there had been no statutory provision regulating the liability in Kansas, the rule enforced there by the courts as regards the right would have obtained in any suit in Missouri. It seems clear that the reference in the amended petition to the Kansas statute did not constitute a new cause of action.

While questions of *right* are regulated by the law of the locality where the cause of action arose or the injury was suffered, a different rule holds when the question is simply one of *remedy*. In that case the principle is without exception; the law of the jurisdiction where the suit is brought must be followed.

This rule obtains in all cases of tort as respects the law of limitations. When a suit is brought in another jurisdiction than that where the injury was suffered, it must, as to time, be in conformity with the statutes of the forum.

It is equally well settled that where a statute of one State creates a liability and prescribes therein the time within which it must be enforced, that period must be respected

wherever suit is brought. This is not an exception to the general doctrine.

Such a provision commonly occurs in statutes giving damages for death. The limitation is really in the nature of a condition that suit shall be brought within the time specified. In *such a case* "the statute creates a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created and not of the remedy. It is a condition attached to the right to sue at all." The Harrisburg, 119 U. S., 214.

Accordingly in this class of cases it has been held that the party suing must bring himself within the statute under which he sues and the limitation need not be pleaded in bar. The statute gives and limits the duration of the right to a certain time.

But a very different question is presented in the present case. The statute of Kansas, which recognizes the liability of the company for the injury suffered, fails to prescribe any particular time for its enforcement, and leaves it in that respect to be controlled by the general statutes of limitation of the State. When a suit is brought in a different State, those general statutes do not in such a case, more than any other, apply, but the laws of the forum are alone administered as regards time.

If the general laws of Kansas in this class of cases must be applied by the courts in Missouri, they are equally applicable to all classes of cases of whatever nature. The citizens of other States could not prosecute demands in their own courts except in accordance with the Kansas statute of limitations if the cause of action arose in that State. The remedy would not be regulated by the law of the place where suit was brought, but by the laws of the country where the controversy arose, which would be contrary to established law.

In Boyd *vs.* Clark, Mr. Justice Brown, while district judge, ruled that in an action for damages for death under the Ontario statute its particular limitation must be respected in every jurisdiction wherein the plaintiff may sue.

But it was also held that if the statute had contained no limitation of time within which an action must be brought and the time had been left to depend upon the general statutes of limitations in Ontario, it was clear "We should have disregarded such statutes and permitted the plaintiff to bring this action at any time before actions of this description would be barred by the statutes of this State."

Boyd *vs.* Clark, 8 Fed. Rep., 850.

We are met with a further objection that the statutes of limitations of Kansas not only affect the remedy, but extinguished the right itself, and reliance is placed upon a section of those statutes which has long been a part of the law of that State. It is as follows:

"When the right of action is barred by the provisions of any statute it shall be unavailable either as a cause of action or ground of defense."

This language is not such as suggests that the legislature intended to depart from the usual policy of such statutes. It does not purport to regulate anything but the right of action and simply provides that such right of action should be unavailable—that is, incapable of being asserted. The remedy alone is gone, not the obligation. (Campoell *vs.* Holt, 115 U. S., 625.)

If it had been intended to extinguish rights, the legislature would have said so and would not have used a phrase which is in entire harmony with the ordinary meaning of statutes of limitations, which affect the remedy only.

The Kansas statutes merely fix a limit within which, in the Kansas courts, rights of action must be asserted. The

legislature simply says that when barred no recovery shall be had in the courts over which they have authority.

The question is one of procedure only, not of right. This is the view taken of the Kansas statute by the supreme court of Missouri.

Referring to the section cited in a recent case, they say:

"We think that these two sections are only ordinary statutes of limitation, which affect the remedy only and do not extinguish the right, and are so construed by the courts of this State and Kansas, as we understand them." (Williams *vs.* St. Louis R. R., 27th Southwest Rep., 390.)

Before the courts in Missouri could be called upon to enforce the foreign limitation as a rule of right and so supersede their domestic law, they must be satisfied beyond any doubt that the right had been extinguished.

That the defendant himself regarded the statute of limitation of Kansas as affecting the remedy only is seen from the manner in which this question is raised.

The nature of a plea of the statute of limitations is a plea to the remedy.

As this Court has frequently observed, such statutes are laws for administering justice, one of the most important of sovereign rights, and are never waived in favor of similar laws of a foreign country or of a different jurisdiction.

The American cases are given in the full brief of my associates.

A discussion of the modern English cases is found in Foote's Private International Jurisprudence, 2d edition, 508.

The decisions of the Kansas supreme court are in harmony with what we contend. In the many cases argued the decision has always been that the statute affects the remedy only.

If the statute extinguished the right, then no subsequent acknowledgment could revive it, nor could the legislature

repeal the limitation. But because the act merely governs the remedy, it has been held that an acknowledgment does revive the right, and because the statute affects the remedy, it can be repealed.

Schmucker *vs.* Sibert, 18 Kan., 104.
Kennedy *vs.* Powell, 34 Kan., 22.
Kent *vs.* Kent, 26 Kan., 40.

In one of the trials of the present cause Mr. Justice Brewer reached the conclusion that the Kansas statutes of limitations did not apply, and he left the case to the jury.

Two other judges of the circuit court, Caldwell and Phillips, reached a similar result.

The cases in which the law of limitations of the foreign jurisdiction has been applied have generally been those of a character which partake of locality or which involve property or contract right.

Such laws vest or divest rights of property or operate as a defense to contracts. They not only act as a bar, but vest a title which must be respected in every jurisdiction.

As to torts, the limitation in those cases was a part of the right conferred by statute and a condition to its exercise.

The defense that the action is not maintainable in Missouri because the liability was under a Kansas statute is one which has been frequently answered by the decisions of this Court.

The most recent announcement is in Northern Pacific Railway Company *vs.* Babcock, 154 U. S., 197. The Court there repeat, that cases of personal injury were controlled by the law of the place where the accident occurred, whether that law was statutory or not. The Court cite with approval Herrick *vs.* Minn., etc., R. R., 31st Minn., 11, in which the courts of Minnesota applied to a cause of action originating in Iowa a statute of the latter State, making railroads re-

sponsible for damages to one employé through the fault of a fellow-servant:

"In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought."

And the same case is cited to show that it is not correct to say that because a statute of one State differs from the law of another State therefore it could be held contrary to the policy of the latter State:

"To justify a court in refusing to enforce a right of action which accrued under the laws of another State because against the policy of our laws it must appear that it is against good morals or natural justice, or that for some such reason the enforcement of it would be prejudicial to the general interests of our own citizens."

Another objection is that the case does not fall within the statute of Kansas.

The injury suffered was by an employé of the company in its service. He was engaged at the time in his regular occupation of repairing locomotives used by the company on their road, and the injury was from the negligence of one of its employés.

The construction placed upon the statute by the supreme court of Kansas clearly shows this case falls within it.

Union Pacific R. R. *vs.* Harris, 33 Kan., 416.
Atchison, T. & S. F. R. R., 37 Kan., 463.

These cases have never been modified or departed from. They are followed in Chicago, etc., R. R. *vs.* Pontius, 52 Kan., 264.

Many of the objections of plaintiff in error are met by Texas Pacific R. R. Co. *vs.* Cox, 145 U. S., 593.

In that case it was charged by one of the same counsel who now sign opposing brief that the amended petition contained "an entirely new charge of negligence, a new cause of action."

In the present case the objection is identical, "an entirely new charge of negligence; a new cause of action was set forth in the amended petition." (Brief, p. 17.)

The original petition in the Cox case asserted the negligence of the company to consist in a defective road-bed. The amended petition states in addition that the coupling apparatus of the cars was defective. The statute of limitations was interposed as a defense on the ground that the amended petition stated a new cause of action and was too late, and that it for the first time set forth the right of the court to entertain the action.

The suit was one brought in Texas by a wife to recover damages against the company for the death of her husband, an employé of the company, the injury having been sustained in Louisiana.

It was claimed by the company that the cause of action was created by the law of Louisiana, not enforceable in Texas, as the right was not one arising under the common law or under the law of the State where the suit was brought. The reply of the court to these objections was that it was not necessary that all the facts should have appeared in the original petition, which was filed in time, and the fact that the jurisdiction was particularly specified in the amended petition or that new facts showing further negligence were there alleged did not make it the equivalent of a new suit or change the cause of action.

That the action was in its nature transitory and maintainable in Louisiana; that where a liability is imposed by either the common law or the statute of the State, if the action is transitory, such liability may be asserted and en-

forced in any court having jurisdiction, if not inconsistent with the policy of the State where the action is brought.

It was also a cause of complaint by the company that the evidence did not justify leaving the case to the jury. The point is also raised in the present suit.

This objection is really not to the action of the court, but to the finding of the jury, and the answer made by this Court in that case applies:

"The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."

We submit that the judgment should be affirmed.

W. HALLETT PHILLIPS,
Of Counsel for Defendant in Error.